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Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft

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Article

Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft

Michael A. McCann *

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INTRODUCTION

On June 26, 2004, the National Basketball Association (“NBA”) will conduct its annual entry draft (“NBA Draft”), which is the exclusive process by which amateur players gain entrance into the NBA. As will be discussed in far greater detail, the NBA Draft consists of two rounds, with each NBA team allocated one selection in each round. Undoubtedly, at least one of the top selections in the 2004 NBA Draft will be a player who has just graduated from high school. In fact, Dwight Howard, a high school senior from Atlanta, Georgia, is the presumptive number one overall selection, with Josh Smith, a high school senior from Smyrna, Georgia, likewise expected to be selected among the top five picks.¹

On June 27, 2004, there will just as likely be a series of newspaper articles doubting whether these “undeveloped,” “unrefined,” and perhaps even “immature” teenagers made the right choice, even when many of them will sign multimillion dollar contracts before their college educations would have begun. No doubt, these articles will mention the names “Taj McDavid,” “Korleone

¹ See NBADraft.net, Mock 2004 Draft, available at <http://nbadraft.net/index.asp> (last visited Feb. 1, 2004). See also Andy Katz, NBA Draft: Howard’s No. 1, ESPN Insider, Jan. 9, 2004 (noting that Dwight Howard and Josh Smith are expected to be selected amongst the top 3 to 5 selections in the 2004 NBA Draft).

Young," "Ousmane Cisse," and "Tony Key"—names only the diehard basketball fan will recognize—and such recognition will arise solely because these high school players failed to make the NBA, and have since become poster children for the NBA's crusade to exclude high school players from the NBA Draft. Indeed, by declaring for the NBA Draft, these players lost their eligibility to play Division I college basketball ("collegiate eligibility"), and have since fallen off the face of the basketball map. Greedy agents, misguided "hoop dreams," poor role models, opportunistic friends and family, and the failure to appreciate the "value" of a college education will be among the reasons cited for their tragic decision.

On June 27, 2004, however, there will be far fewer articles discussing how the vast majority of high-school basketball players made the right decision by declaring for the NBA Draft. Surely, few articles will mention how from 1995 to 2003, over 80% of drafted high school players became or will become multi-millionaires by the age of 21, or how they have maximized their earning potential by gaining the ability to become unrestricted free-agents—when as many as 30 teams bid for their services—by the tender age of 22, when, coincidentally, some of their counterparts will graduate from college and become bound by the nearly non-negotiable rookie salary scale for three to five years. In fact, this Article will show that most players who skip college may earn as much as \$100 million more over the course of their careers than if they had done the "smart thing" and earned a college diploma.

Moreover, this Article will explore how high school players who enter the NBA Draft are a small, self-selected group, comprised almost entirely of exceptionally talented players. Simply put, for every Korleone Young, there are two or three Kevin Garnetts. This result is not surprising, since the NBA's economic system provides incentives for premiere high school players to seek entrance into the NBA as soon as possible. In turn, since those players are often the most talented, they tend to develop at a uniquely accelerated rate, and thus their earlier arrival—and longer stay—ultimately benefits the NBA and its fans. At the same time, those high school players better off going to college tend to do so because of contrasting incentives created by this same economic system. In short, high school players have proven to be the best group of players entering the NBA because the NBA's economic system dictates that very outcome.

Equally important, this Article will survey whether federal labor law and antitrust law might preclude the NBA from imposing a ban on players who just graduated from high school. This discussion will analyze the two most likely means by which these players could be banned from the NBA Draft: a collectively bargained ban or a unilaterally imposed ban.

First, should the NBA and the National Basketball Players' Association

("NBPA") agree to a provision banning high school players from the NBA Draft, a court may defer to their collective bargaining, even though high school players would not have had a "seat at the negotiating table" when such a rule was created. Although the NBA and the NBPA flirted with such negotiations in April 2003, this scenario seems unlikely, in part due to the specter of litigation, and in part due to likely allegations of hypocrisy levied against the NBPA, which historically has unequivocally opposed such a rule. Moreover, should former Ohio State football player Maurice Clarett's recent victory against the National Football League ("NFL") and its age prohibition be upheld on appeal, the mere ability of the NBA and NBPA—and any professional sports league and players' association—to construct such a rule would be cast in doubt.

Even in the unlikely event that both Clarett's victory against the NFL is overturned and the NBPA accepts a ban on high school players during the next collective bargaining negotiation, a group of sympathetic and, more importantly, influential NBPA members could seek to decertify the union. Decertification would require a majority vote of NBPA members. Provided a majority of NBPA members agree to decertify, the NBPA would lose its collective bargaining power, thus rendering the ban ineffectual.

Should the NBA unilaterally impose the ban, however, the analysis turns to antitrust law. Despite recent judicial trends to apply the flexible rule of reason analysis to group boycotts, courts have remained generally consistent in applying the more stringent *per se* analysis to boycotts where the boycotting group serves as the only option for potential buyers or sellers. In the context of the NBA, high school players, like all potential draft picks, are the "sellers" since they are selling their talents to NBA teams, which are the buyers. Because there is no substitute equivalence to the NBA, boycotted players would not be able to find comparable employment. In this scenario, therefore, high school players would have an excellent opportunity to characterize the ban as a group boycott.

A less predictable scenario would occur if a court employs rule of reason analysis or quasi-rule of reason analysis. In those instances, a judicial balancing of procompetitive and anticompetitive effects would weigh a number of factors, including how a ban fails to provide procedural safeguards, how the NBA dominates global basketball, and how high school players comprise only 4.1% of all NBA players. Because antitrust law has generally been confined to instances where large segments of buyers or sellers have been boycotted, the dearth of high school players may prove significant. On the other hand, a blanket prohibition on high school players would fail to provide "procedural safeguards," thus potentially animating a court to find it in violation of antitrust law.

I. EVOLUTION OF THE NBA, THE NBPA, AND THE ROOKIE SALARY SCALE

A. The Creation of the NBA and NBPA and Initial Attempts at Collective Bargaining (1949–1991)

When the Basketball Association of America and the National Basketball League merged in 1949, the NBA was formed. As an unincorporated association comprised of 12 privately owned member teams, each team was bound by membership rules. Almost immediately, the NBA provided the premier basketball product to date, as the best players from both the Basketball Association of America and the National Basketball League played together for the first time.²

Soon thereafter, the NBA's players sought ways to improve their earning potential, and in 1954, Bob Cousy, arguably the NBA's best player, orchestrated the formation of the NBPA.³ Within three years, the NBPA had successfully persuaded the NBA's owners to provide more benefits to players, including payment of moving expenses for traded players; payment of player salaries in 10 installments rather than 12; payment of a \$7 dollar per diem; and a limit of 20 exhibition games.⁴

Although the NBA grew in size during its first two decades, it began to encounter competition in 1967 when the American Basketball Association ("ABA") was formed.⁵ Of primary concern to the NBA, the ABA signed away some of the NBA's best players, including Rick Barry, Billy Cunningham, and Zelmo Beaty.⁶ As a result of inter-league competition for players, the NBPA was able to extract a series of new concessions from the owners.⁷ Although the ABA folded, and was absorbed by the NBA in 1976, the NBPA continued to obtain improved employment conditions.⁸

By the early 1980s, the additions of such highly marketable superstars as

² See generally, Tim Povtak, Happy 100th Birthday Basketball, *Orlando Sentinel Trib.*, Dec. 22, 1991, at C9.

³ Robert Bradley, Labor Pains Nothing New to the NBA, at <http://hometown.aol.com/apbrhoops/labor.html> (last visited Feb. 1, 2004).

⁴ *Id.*

⁵ For example, the Chicago Bulls joined the NBA in 1966. Mitch Harris, NBA to Expand, but not Before 1988–89, *Rec. (Bergen, NJ)*, Oct. 22, 1986, at C1. For a brief history of expansion in the NBA, see Tim Povtak, The Expansion Story, *Orlando Sentinel Trib.*, Apr. 28, 1991, at C11.

⁶ Bill Has, Finances Were Shaky, but ABA Had Its Stars, *News & Rec. (Greensboro, N.C.)*, Aug. 28, 1995, at C2.

⁷ For a detailed (if biased) history of the NBPA during this time, see NBPA.org, NBPA Timeline, at <http://www.nbpa.org/aboutus/history.html> (last visited Feb. 1, 2004).

⁸ Some of those benefits included raised pension benefits for veteran players, increased minimum salaries, and per diem allowance. Bradley, *supra* note 3.

Larry Bird and Earvin "Magic" Johnson caused fan interest in the NBA to explode, a phenomenon evidenced by a dramatic surge in ticket sales and more lucrative television contracts.⁹ To their delight, NBA team owners experienced an extraordinary increase in revenues, though the increase was partially offset by rising player salaries—a result of the NBPA seeking a greater piece of the growing NBA pie.¹⁰

With player salaries on the rise, NBA owners demanded a cap on team payrolls ("salary cap"), and in the 1983 Collective Bargaining Agreement ("1983 CBA"), the NBA and the NBPA agreed to a salary cap, but guaranteed the players between 53% and 57% of the NBA's gross revenues (*i.e.*, gate receipts, local and national television and radio revenue and preseason and postseason revenue).¹¹ The spirit of the 1983 CBA was reaffirmed in the 1987 CBA, which mostly extended these provisions for six additional years.¹²

In 1991, however, the NBPA and the NBA experienced discord over whether the NBA could exclude from its calculation of gross revenues those proceeds that derived from luxury suite rentals, playoff ticket sales, and arena signage.¹³ By doing so, the NBA was able to maintain a salary cap number lower than would be required if those particular proceeds contributed to gross revenues.

B. The Rise of the Rookie Salary Scale & the Decertification Movement (1991–1998)

Although the NBA and the NBPA settled their differences in 1991, bad will persisted, and with the 1987 CBA having already expired in 1994, the owners locked out the players following the 1995 NBA Finals.¹⁴ Among the primary reasons precipitating the 1995 lockout was the owners' concerns over exorbitant contracts demanded by rookie first round draft picks. Indeed, though a player picked in the first round could only negotiate with the team that had selected him, he held additional leverage through the "hold out," a phrase describing a player who refuses to report to the team.

To illustrate the "holdout" concept: Glenn Robinson was selected first overall by the Milwaukee Bucks in the 1994 NBA Draft, sought a \$100 million dollar contract, and held out of training camp until the Bucks mostly capitulated

⁹ Fran Blinebury, *Channel Surfing Won't be Enough*, *Hous. Chron.*, Apr. 16, 1994, § Sports, at 1.

¹⁰ NBPA.org, *supra* note 7.

¹¹ Alan Greenberg, *NBA closed until Dec. 1*, *Hartford Courant*, Oct. 29, 1998, at C1.

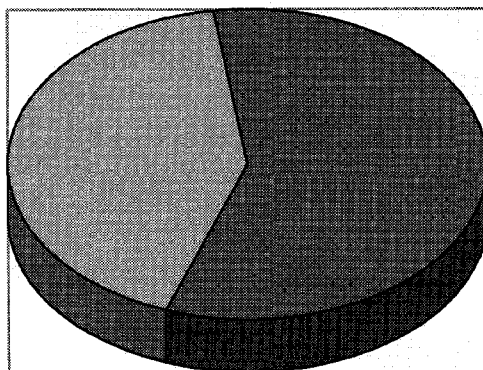
¹² Bradley, *supra* note 3.

¹³ *Id.*

¹⁴ *Id.*

and signed him to a 10-year, \$68.15 million contract.¹⁵ Such a scenario prompted the owners to demand stricter parameters on rookie contracts, and veteran players readily agreed, as many of them would receive larger portions of the teams' salary caps if rookie contracts were reduced. See Chart 1 to illustrate why veteran players, like team owners, were concerned about the size of rookie contracts.

CHART 1: GLENN ROBINSON'S ROOKIE CONTRACT & MILWAUKEE BUCKS' 1994 SALARY CAP



- Milwaukee Bucks' 1994 Salary Cap Space Devoted to Glenn Robinson's Rookie Salary
- Remaining Salary Cap Space Available to the Other 14 Bucks Players in 1994

As a result, the NBA and the NBPA agreed to a rookie salary scale that was determined solely by draft position.¹⁶ The precise salary of each draft position was calculated by using a weighted average of the rookie salaries received by the

¹⁵ Richard Justice, *Webber Hits the Jackpot*, Wash. Post, Oct. 11, 1995, at F1.

¹⁶ Larry Coon, *NBA Salary Cap/Collective Bargaining Agreement FAQ*, at <http://members.cox.net/lmcoon/salarycap.htm> (last modified Dec. 8, 2002). Larry Coon's website is a terrific resource for anyone interested in the NBA's collective bargaining agreement.

TABLE 1: MAXIMUM NBA SALARY

"MAXIMUM NBA SALARY" = THE GREATER OF THE LISTED AMOUNT OR THE LISTED PERCENT OF THE TEAM'S SALARY CAP				
YEARS IN NBA	DEFINED MAXIMUM SALARY*	01-02	02-03	03-04
1	\$9,000,000 or 25% of cap	\$10,625,000	\$10,067,750	\$10,960,000
1	\$9,000,000 or 25% of cap	\$10,625,000	\$10,067,750	\$10,960,000
2	\$9,000,000 or 25% of cap	\$10,625,000	\$10,067,750	\$10,960,000
3	\$9,000,000 or 25% of cap	\$10,625,000	\$10,067,750	\$10,960,000
4	\$9,000,000 or 25% of cap	\$10,625,000	\$10,067,750	\$10,960,000
5	\$9,000,000 or 25% of cap	\$10,625,000	\$10,067,750	\$10,960,000
6	\$9,000,000 or 25% of cap	\$10,625,000	\$10,067,750	\$10,960,000
7	\$11,000,000 or 30% of cap	\$12,750,000	\$12,081,300	\$13,152,000
8	\$11,000,000 or 30% of cap	\$12,750,000	\$12,081,300	\$13,152,000
9	\$11,000,000 or 30% of cap	\$12,750,000	\$12,081,300	\$13,152,000
10+	\$14,000,000 or 35% of cap	\$14,875,000	\$14,094,850	\$15,344,000

Also for the first time, NBA teams whose player payrolls exceed the salary cap can now be assessed a "luxury tax," a tax which requires those teams to pay the NBA an equal amount for each dollar they exceed the luxury tax threshold.²⁹ The luxury tax is only implemented, however, when total NBA player salaries and benefits across the league exceed a certain percent of basketball-related

²⁹ 1999 Collective Bargaining Agreement, *supra* note 20, at Art. VII, available at <http://www.nbpa.com/cba/articleVII.html> (last visited Feb. 1, 2004).

See also Shira Springer, A Taxing Offseason Awaits Celtics GM, *Boston Globe*, June 3, 2002, at D1. For an excellent discussion of the luxury tax, see

Dan T. Rosenbaum, The NBA Luxury Tax and Other Collective Bargaining Agreement Issues, at <http://www.uncg.edu/eco/rosenbaum/luxurytax1.pdf> (last visited Feb. 1, 2004). Also, the NBPA has recently targeted the elimination of the luxury tax as a primary goal in its upcoming discussions with the NBA

for a new collective bargaining agreement. Jonathan Feigen, *Luxury Tax Could be Gone After 2004-05*, *Hous. Chron.*, Dec. 14, 2003, available at <http://www.chron.com/cs/CDA/ssistory.mpl/sports/bk/bkn/2293794>.

same pick during the previous seven drafts.¹⁷

Though its mechanics were altered after the 1999 CBA, the rookie salary scale has harmonized draft negotiations between draft picks and the teams that select them. In fact, there has not been one draft pick holdout under the rookie salary scale.¹⁸ The rookie salary scale reflected in the 1995 CBA was not entirely adverse to first round picks, however: their initial contracts would last only three seasons, after which those players would be eligible to become "unrestricted" free agents. As a point of clarification, an "unrestricted" free agent may sign with any team, whereas a "restricted" free agent may only sign with another team if the player's original team does not match the contract and keep the player.¹⁹ The ability of teams to match contract offers is also called the "right of first refusal."²⁰

Although the NBA and NBPA could agree on a rookie salary scale, other issues remained irreconcilable. Division occurred even within the NBPA, as after NBPA President Buck Williams agreed with NBA Commissioner David Stern and NBA Deputy Commissioner Russ Granik on new, six-year CBA, a group of dissenting players, led by Michael Jordan and Patrick Ewing, sought to decertify the union. The efforts of the dissenting players failed, as the members of the NBPA, by a vote of 226-134, refused to decertify, and later approved the proposed CBA ("1995 CBA"), which dropped the guarantee of gross income to players from 53% to 48%, but included as part of that income luxury suites, international television, and arena signage.²¹ Along with the rookie salary scale, the 1995 CBA guaranteed unrestricted free agency for all players following the conclusion of their contracts, and largely preserved the so-called "Larry Bird exception" to the salary cap, an exception which allowed teams to re-sign their own free agents at any price.²² At the same time, however, the 1995 CBA

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Bart Hubbach, *NBA Labor Talks Resume Today*, Dallas Morning News, Oct. 8, 1998, at 3B. To illustrate the difference between unrestricted and restricted free agency, if Antoine Walker of the Dallas Mavericks became an unrestricted free agent and signed a contract with the Los Angeles Lakers, the Mavericks could do nothing to retain him; alternatively, if Walker became a restricted agent and signed a contract with the Lakers, the Mavericks could match the contract and keep him.

²⁰ According to the 1999 Collective Bargaining Agreement between the NBA and NBPA, "Restricted Free Agent" means a veteran free agent who is subject to a team's right of first refusal in accordance with Article XI. NBPA.org, *Collective Bargaining Agreement*, Jan. 6, 1999, NBA-NBPA, Art. (I)(xx), available at <http://www.nbpa.com/cba/articleI.html> (last visited Feb. 1, 2004).

²¹ Bradley, *supra* note 3.

²² Under the 1999 CBA, teams can exceed the salary cap and re-sign their own players up to those players' maximum salaries (as opposed to "any salary"). Roscoe Nance, *NBA to the Brink?*, USA Today, Aug. 9, 1995, at 1C; see also 1999 Collective Bargaining Agreement, *supra* note 20, at Art.

included a provision that if player salaries exceeded 51.8% of basketball-related income, the NBA could then reopen negotiations after the 1998 season.²³

C. The 1999 CBA & the Revised Rookie Salary Scale (1998–Present)

In March of 1998, the NBA concluded that player salaries totaled 57% of basketball-related income, prompting the NBA to reopen the CBA.²⁴ More alarmingly from the NBA's perspective, by limiting first round draft pick contracts to three seasons and by granting unrestricted free agency upon the conclusion of those contracts, NBA teams could retain their young superstars only by agreeing to enormous contract extensions. For instance, Kevin Garnett, a player who directly ascended from high school to the 1995 NBA Draft and was one of the first rookies to experience the rookie salary scale, signed a six-year, \$121 million extension at the age of 21.²⁵ In addition, a number of teams could not afford to keep their young stars, and were thus forced to trade them, as evidenced by Antonio McDyess, Damon Stoudamire, Joe Smith and Jerry Stackhouse all being traded before they could become unrestricted free agents at the conclusion of their third season.²⁶

Renegotiations for a new CBA in 1998 proved futile, however, and the NBA ultimately canceled the first four months of the 1998–1999 season. Finally, on January 6, 1999, the NBA and NBPA agreed to a new CBA ("1999 CBA") that will expire following the 2004–2005 season.²⁷ Unlike previous collective bargaining agreements, the 1999 CBA sets parameters for all contracts, including "maximum" dollar amounts.²⁸

(l)(qq), available at <http://www.nbpa.com/cba/articleI.html>; (defining Larry Bird exception under the label "qualifying veteran free agent"); see also Coon, *supra* note 16, at <http://members.cox.net/lmcoon/salarycap.htm#16>.

²³ Mark Conrad, NBA-NBPA Dispute: Time for a New Pact?, *N.Y.L.J.*, July 17, 1998, at 5.

²⁴ Eddie Sefko, Owners to Reopen Labor Agreement, *Hous. Chron.*, Mar. 24, 1998, § Sports, at 2.

²⁵ John N. Mitchell, Talk About Trades Near Deadline Now Just That: No Action, *Wash. Times*, Feb. 23, 2000, at B2.

²⁶ Sefko, *supra* note 24.

²⁷ In December 2003, the NBA elected to extend the 1999 CBA until the completion of the 2004–05 season, per Article XXXIX of the 1999 CBA. See NBA Extends Deal with Players Union, *Boston Globe*, Dec. 9, 2003, at E2. See also Michael Murphy, Pact Suits Him to a T, *Hous. Chron.*, Jan. 7, 1999, at A1 (providing history on the developments surrounding the 1999 CBA).

²⁸ Player contracts cannot exceed seven seasons. 1999 Collective Bargaining Agreement, *supra* note 20, at Art. IX, available at <http://www.nbpa.com/cba/articleIX.html> (last visited Feb. 1, 2004).

income (61.1% in 2003–04; 63.3% in 2004–05).³⁰ This occurred in the 2002–03 season, as player salaries approximated 66% of basketball-related income.³¹ Sixteen teams, most notably the Portland Trailblazers, had team payrolls in excess of the \$52.3 million luxury tax threshold.³² Saddled with the NBA's highest payroll, the Trailblazers were assessed a startling \$45 million luxury tax—an amount larger than the entire team payroll of the 2002–03 Denver Nuggets—thus requiring Trailblazers' ownership to effectively pay over \$140 million for its 2002–03 player salaries.³³

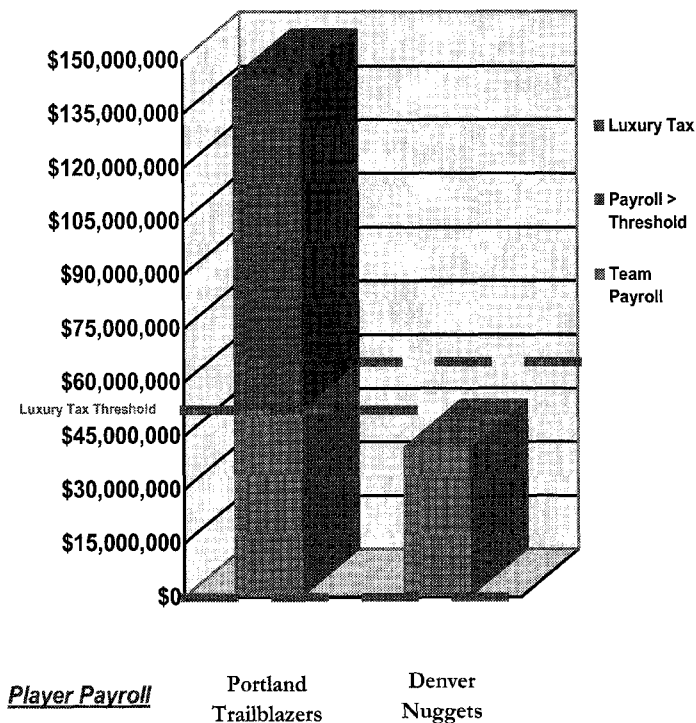
³⁰ Coon, *supra* note 16, at <http://members.cox.net/lmcoon/salarycap.htm#15>.

³¹ Sam Smith, Curry, Chandler, Put Bulls in Tough Position, *Chi. Trib.* Nov. 30, 2003, available at <http://www.bayarea.com/mld/mercurynews/sports/7383233.htm>.

³² *Id.*

³³ Derived from Hoopsworld.com, 2002–03 NBA Salaries, at http://www.hoopsworld.com/article_3473.shtml (last visited Feb. 1, 2004).

**TABLE 2: ILLUSTRATION OF LUXURY TAX PENALTY
FROM 2002-03 NBA SEASON**



With respect to the NBA Draft, the 1999 CBA modifies the rookie salary scale so to insure that a team can retain a first round draft pick for at least four seasons, thus curtailing the earning potential of those players.³⁴ Specifically, under Article VIII, contracts for first round draft picks are extended from three years to three years with a team option for a fourth year, and at the conclusion of

³⁴ Id. at Art. VIII, available at <http://www.nbpa.com/cba/articleVIII.html> (last visited Feb. 1, 2004).

the fourth year, those players may become restricted free agents.³⁵ Importantly, the 1999 CBA creates incentives for these players to remain with their teams, particularly if such players want to “maximize” their contracts, for as noted earlier, the Larry Bird exception allows teams to exceed the salary cap in order to re-sign their own players. As a practical effect, when a first round pick concludes his fourth season, usually only the team for which he has played can offer him the “maximum” contract, so his “restricted free agent” status proves quite restricted.

The 1999 CBA also modifies compensation calculations for first round draft picks. In determining the compensation for the three-year contract, the 1999 CBA replaces the seven-season weighted average with a preset dollar amount slotted for each first round draft position, though the team and player can negotiate a salary from 80% to 120% of that amount.³⁶ Preset salaries range widely among first round picks, as the first pick in the 2004 NBA Draft will likely command \$13.5 million over his first three seasons, while the last pick in the first round can earn a maximum of \$2.7 million over that time.³⁷ For each successive NBA Draft, the three year salaries increase by 5%, so that first pick in the 2004 NBA Draft will earn 5% more per year over his first three years than the first pick in the 2003 NBA Draft.³⁸ NBA teams may elect to extend the contracts of their first round picks for a fourth season, and if they do so, the salary figure will equal the first round pick's third year salary plus a fixed percent increase of that salary, ranging from 26.2% for the first overall pick to 80.5% for the last pick in the first round.³⁹ At the conclusion of his fourth season, a first round pick may become a restricted free agent, provided his team has offered a “qualifying” offer for a fifth season. This qualifying offer must equal his fourth year salary, plus a fixed percent increase ranging from 30% to 50%, depending on whether he was selected earlier or later in

³⁵ *Id.*

³⁶ 1999 Collective Bargaining Agreement, *supra* note 20, at Exhibit B, available at <http://www.nbpa.com/cba/exhibits/exhibitB.html> (last visited Feb. 1, 2004).

³⁷ *Id.* This calculation assumes that the first pick in the 2004 NBA Draft will, like all first overall picks thus far under the 1999 CBA, negotiate a 20% annual increase of each year slotted, meaning he earns the following salaries: first year: \$4,179,720; second year: \$4,493,160; third year: \$4,806,720. In total, he earns \$13,479,600 over his first year years. This calculation also assumes the last pick in the first round of the 2004 NBA Draft will earn the maximum, thus negotiating a 120% annual increase of each year slotted and earning the following salaries: first year \$835,560; second year: \$898,200; third year: \$960,840. In total, he earns \$2,694,600 over his first three years. For first round pick yearly salaries, see <http://www.nbpa.com/cba/exhibits/exhibitB.html> (last visited Feb. 1, 2004).

³⁸ The 5% is based on the 1998–99 figure, not a compounded percentage. Coon, *supra* note 16.

³⁹ 1999 Collective Bargaining Agreement, *supra* note 20, at Exhibit B, available at <http://www.nbpa.com/cba/exhibits/exhibitB.html> (last visited Feb. 1, 2004).

the first round.⁴⁰ Absent a team extension for the fourth season, or a qualified offer for the fifth season, a player selected in the first round may become an unrestricted free agent at the conclusion of his third or fourth year, respectively. Otherwise, he may only become an unrestricted free agent at the conclusion of his fifth year.

With respect to second round picks, the 1999 CBA reaffirms previous practice, as teams can sign second round selections for as low as the NBA minimum salary (\$367,000 for the 2003–04 season).⁴¹ Usually players selected in the second round indeed sign for the NBA minimum, and usually for contracts lasting only one or two years.⁴² Players not selected in either two rounds immediately become unrestricted free agents. Table 3 applies the rookie salary scale to three high school players selected in the 2003 NBA Draft, while Table 4 computes the rookie salary scale for the 2004 NBA Draft.

⁴⁰ *Id.*

⁴¹ Jason Kaneshiro, *English Living a Dream*, Honolulu Star-Bulletin, July 19, 2003, available at <http://starbulletin.com/2003/07/19/sports/story2.html>; see also Nick Canepa, *NCAA's Decision Bad for Athletes, Schools and Sport*, San Diego Union-Trib., May 3, 2002, at D1 (noting that the minimum salary for the 2002–03 season was \$349,000).

⁴² Players selected at the beginning of the second round are more likely to receive two year contracts than are those selected at the end of the second round. Gary Lambrecht, *Hope Glimmers for a Fallen Star*, Balt. Sun, June 22, 2001, at 1D.

TABLE 3: Illustration of Rookie Salary Scale (with 3 high school picks)

Player	2003-04	2004-05	2005-06	2006-07	2007-08
LeBron James Selected 1 st Overall (first round) by the Cleveland Cavaliers	• Per Rookie Salary Scale, signs 3-year guaranteed contract with Cavs for \$13.0 million. • Earns \$4.0 million.	• Earns \$4.3 million.	• Earns \$4.6 million.	• Per Scale, Cavs must exercise 1-year option or let James become an unrestricted free agent. • If Cavs exercise option, James earns \$5.8 million.	• Per scale, James can become a <i>restricted</i> free agent if Cavs make qualifying offer. • If he receives a qualifying offer, James earns at least \$7.6 million, or signs a new contract.
Kendrick Perkins Selected 27 th Overall (first round) by the Boston Celtics	• Per Rookie Salary Scale, signs 3-year guaranteed contract with Celtics for \$2.6 million. • Earns \$814,320.	• Earns \$875,400.	• Earns \$936,480.	• Per Scale, Celtics must exercise 1-year option or let Perkins become an unrestricted free agent. • If Celtics exercise option, Perkins earns \$1.7 million.	• Per scale, Perkins can become a <i>restricted</i> free agent if Celtics make qualifying offer. • If he receives a qualifying offer, Perkins earns at least \$2.5 million, or signs a new contract.
James Lang Selected 49 th Overall (second round) by the New Orleans Hornets	• Akin to most 2 nd round picks, Lang signs 1-year non-guaranteed contract, with club option for a 2nd season, for the league minimum. • Would have earned \$366,931 if he had remained on roster for the entire year, but was waived on 12/30/03. For his efforts, however, Lang pocketed over \$150,000.	• Though the Hornets had waived Lang, had they kept him instead, they could have exercised the 1-year option or let Lang become an unrestricted free agent. • Had the Hornets exercised the option, Lang would have earned \$620,046 this season.	• Most second round picks are out of the NBA by this point. These players often matriculate to minor league basketball teams—where their earning power is considerably less—or pursue a new profession. <u>But...</u> Rarely, a second round pick will surprise the NBA and become a competent, if not star player. Such star players gain optimal negotiating power at the conclusion of their 2nd season—as they become non-Larry Bird-rights restricted free agents. To illustrate: Assume Lang had played well during his rookie season, convincing the Hornets to exercise his 04-05 option. Assume then Lang had an excellent 2nd season. At the conclusion of that season, Lang would have become a restricted free agent. Importantly, Lang would then have no Larry Bird rights, since he would have only played 2 seasons—and not the required 3 seasons—with 1 team. As a result, the Hornets could not have then re-signed Lang for an amount above the salary cap (as they may do with players who play at least 3 seasons with them). While the Hornets would have preserved the right to match any contract, they could have only matched a contract that would not have caused their player payroll to exceed the salary cap. This type of situation transpired in 2003, when 2001 2nd round pick Gilbert Arenas of the Warriors became a free agent, and because Arenas had no Larry Bird rights and because the Warriors were over the cap, the Warriors could not match the 6-year, \$65 million free agent contract Arenas had signed with the Wizards.		

TABLE 4: ROOKIE SALARY SCALE FOR PLAYERS IN 2004 NBA DRAFT

YEARS 1-3: 1ST ROUND PICK SALARIES ASSUME PLAYER AGENT NEGOTIATED MAXIMUM (120 PERCENT) AVAILABLE SALARY YEAR 4: FOR 1ST ROUND PICKS, TEAMS HAVE OPTION TO EXTEND CONTRACTS FOR THE 4TH YEAR FOR THE AMOUNT LISTED YEAR 5: FOR 1ST ROUND PICKS, TEAMS THAT PROVIDE A QUALIFYING OFFER FOR THE 5TH YEAR RETAIN RIGHT OF FIRST REFUSAL							
Pick	1 st Year Salary in millions	2 nd Year Salary in millions	3 rd Year Salary in millions	Cumulative Guaranteed Earnings Years 1-3 in millions	Team's 4th Year Option in millions	Cumulative Earnings Years 1-4 in millions	Team's 5 th Year Qualifying Offer in millions
1	\$4.28	\$4.49	\$4.81	\$13.48	\$6.06	\$19.54	\$7.88
2	\$3.74	\$4.02	\$4.30	\$12.06	\$5.43	\$17.49	\$7.08
3	\$3.36	\$3.61	\$3.86	\$10.83	\$4.88	\$15.72	\$6.41
4	\$3.03	\$3.25	\$3.48	\$9.77	\$4.41	\$14.17	\$5.81
5	\$2.74	\$2.95	\$3.15	\$8.84	\$4.00	\$12.84	\$5.30
6	\$2.49	\$2.68	\$2.86	\$8.03	\$3.63	\$11.66	\$4.84
7	\$2.27	\$2.44	\$2.61	\$7.33	\$3.32	\$10.65	\$4.45
8	\$2.08	\$2.24	\$2.40	\$6.72	\$3.05	\$9.77	\$4.11
9	\$1.91	\$2.06	\$2.20	\$6.17	\$2.81	\$8.98	\$3.80
10	\$1.82	\$1.96	\$2.09	\$5.97	\$2.67	\$8.53	\$3.63
11	\$1.73	\$1.86	\$1.99	\$5.57	\$2.64	\$8.21	\$3.61
12	\$1.64	\$1.76	\$1.89	\$5.29	\$2.60	\$7.90	\$3.58
13	\$1.56	\$1.68	\$1.79	\$5.03	\$2.56	\$7.59	\$3.54
14	\$1.48	\$1.59	\$1.70	\$4.78	\$2.52	\$7.30	\$3.51
15	\$1.41	\$1.51	\$1.62	\$4.54	\$2.48	\$7.02	\$3.47
16	\$1.34	\$1.44	\$1.54	\$4.31	\$2.36	\$6.67	\$3.31
17	\$1.27	\$1.37	\$1.46	\$4.10	\$2.24	\$6.34	\$3.17
18	\$1.21	\$1.30	\$1.39	\$3.89	\$2.13	\$6.03	\$3.03
19	\$1.15	\$1.24	\$1.33	\$3.72	\$2.04	\$5.76	\$2.91
20	\$1.11	\$1.19	\$1.27	\$3.57	\$1.96	\$5.53	\$2.81
21	\$1.06	\$1.14	\$1.22	\$3.42	\$1.95	\$5.37	\$2.80
22	\$1.02	\$1.10	\$1.17	\$3.29	\$1.93	\$5.22	\$2.79
23	\$0.98	\$1.05	\$1.13	\$3.16	\$1.91	\$5.07	\$2.78
24	\$0.94	\$1.01	\$1.08	\$3.03	\$1.89	\$4.92	\$2.76
25	\$0.90	\$0.97	\$1.04	\$2.91	\$1.87	\$4.78	\$2.74
26	\$0.87	\$0.94	\$1.00	\$2.81	\$1.81	\$4.62	\$2.67
27	\$0.85	\$0.91	\$0.97	\$2.73	\$1.76	\$4.49	\$2.61
28	\$0.84	\$0.90	\$0.97	\$2.71	\$1.75	\$4.46	\$2.60
29	\$0.84	\$0.90	\$0.96	\$2.70	\$1.73	\$4.43	\$2.60
30	\$0.83	\$0.89	\$0.95	\$2.68	\$1.72	\$4.40	\$2.58
2 nd ROUND PICKS	If He Makes Team... \$385,277 Non-Guaranteed	Team Option for \$682,051	?	?	NA	?	NA

II. THE NBA DRAFT & DRAFTED PLAYER RIGHTS

A. Rags to Riches (1949–January 1999)

The NBA has utilized a number of methods to determine how amateur players are allocated to NBA teams, ranging from competitiveness considerations (*i.e.*, allowing NBA teams with poor records to select the best college basketball players) to geographic considerations (*i.e.*, allowing NBA teams to select nearby college stars) and to legitimacy considerations (*i.e.*, deterring NBA teams from deliberately losing games in order to secure a better draft position). From 1949 to 1957, teams selected college players until all of them were selected, and the selection process was based on the teams' regular season record.⁴³ From 1957 to 1961, teams engaged in a draft-like process of 14 to 21 rounds based on the available college talent.⁴⁴ From 1962 to 1965, the NBA instituted the "territorial choice," allowing teams to select star college players from their geographic regions.⁴⁵

By 1966, however, the Boston Celtics had won eight consecutive NBA championships, and the NBA decided to adjust the allocation of amateur players to better equip weaker teams. Specifically, the NBA eliminated territorial considerations and formally adopted the NBA Draft, with each team allocated one selection in each of the NBA Draft's 10 rounds, along with additional rounds for compensatory selections.⁴⁶ At this time, the NBA employed a very simple system to determine draft order: teams would select based on the inverse order of their regular season records, and if two teams had identical records, a coin flip would break the tie. The only exception to this rule was in determining which team would obtain the number one overall pick, which was resolved by a coin flip between the worst team in the Eastern and Western conferences, respectively.⁴⁷

The most obvious purpose of the NBA Draft was to enable weaker teams to select the best college basketball players. Indeed, the NBA hoped that team "dynasties," like that achieved by the Boston Celtics, would come to an end.⁴⁸

A less heralded reason for the NBA Draft, however, was to prevent amateur

⁴³ John C. Graves, *Controlling Athletes with the Draft and Salary Cap: Are Both Necessary?*, 5 Sports L. J. 185, 187 (1998).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ In 1987, the NBA and the NBPA agreed to a six-year collective bargaining agreement, which reduced the college draft to three rounds in 1988 and two rounds in 1989. Ian Love, *NBA Draft: Short on Centers, Two Rounds Long*, U.P.I., June 24, 1989, available at LEXIS, News Group.

⁴⁷ Ailene Voison, *11 teams test luck in lottery*, Atlanta J. & Const., May 19, 2001, at 4.

⁴⁸ Anthony Cotton, *In Pursuit of Ewing*, Wash. Post, Apr. 10, 1985, at B1.

players from bargaining with multiple NBA teams. This intention remains observable today. Indeed, once a team drafts an amateur player, he becomes the exclusive property of the team for at least one calendar year.⁴⁹ If the drafted player has exhausted his collegiate eligibility and wants to enter the NBA as soon as possible, but also wants to negotiate with multiple teams, he may refuse to sign with the team that drafted him for one year. At the conclusion of that year, the team that drafted him no longer controls his rights, yet the player then becomes eligible to be selected again in the NBA Draft, and if drafted a second time, he again becomes the property of one NBA team for one year.⁵⁰ The only way this player can negotiate with multiple teams is by refusing to sign for one year following the time when he was drafted a second time, as he would then become an unrestricted free agent. Of course, this player would have waited two years after he was originally drafted in order to negotiate with multiple NBA teams.⁵¹ For drafted players who are collegiate underclassmen or who have just graduated from high school, the wait can be significantly longer.⁵² Practically, therefore, the NBA Draft has become the exclusive entrance for top amateur players into the NBA. In contrast, only those amateur players who are passed over in the NBA Draft can negotiate immediately with multiple NBA teams, though history shows that undrafted players earn considerably less than drafted players, and they often never make it to the NBA.⁵³

Although the NBA Draft has largely prevented dynasties, it has also created incentives for teams to lose games in order to secure better draft position. Such a concern was amplified at the end of the 1983–84 season, when the Houston Rockets were alleged to have deliberately lost games in order to secure the worst record in their conference, thereby giving them a 50% to chance to win the top pick and select Hakeem Olajuwon, who starred at nearby University of Houston.⁵⁴ After this scenario played out, the concept of the “Lottery” was adopted during the 1984 NBA owners’ meetings, whereby all seven non-playoff

⁴⁹ This assumes the NBA team has made him a qualifying offer. Collective Bargaining Agreement, *supra* note 20, at Art. X(3)(b), available at <http://www.nbpa.com/cba/articleX.html> (last visited Feb. 1, 2004).

⁵⁰ If he is not selected a second time around, he becomes an unrestricted free agent. *Id.* at Art. X(3)(c), available at <http://www.nbpa.com/cba/articleX.html> (last visited Feb. 1, 2004).

⁵¹ *Id.*

⁵² See *infra* Part II.

⁵³ Undrafted players are typically less talented, and while they become unrestricted free agents and can pursue employment with any team, they typically either sign non-guaranteed contracts or simply cannot find employment in the NBA. Patrick Kinahan, Jensen, Arceneaux Unlikely Selections in Today’s Draft, *Salt Lake Trib.*, June 28, 2001, at C1.

⁵⁴ NBA observers believe there was a longstanding practice of teams losing games to gain a better draft position. Sam Smith, *Houston Just Missed Dynasty*, *Chi. Trib.*, June 11, 1998, § Sports, at 11.

teams would have an equal chance to secure picks one through seven.⁵⁵ To determine the drafting order, the NBA Commissioner would open one of seven sealed envelopes to reveal which team logo was inside.

The effects of the Lottery were immediately evident. Indeed, while the Golden State Warriors had tied for the NBA's worst record in the 1984–85 season, they received only the seventh selection, whereas the team with the seventh worst record, the New York Knicks, secured the first overall pick.⁵⁶ Responding to allegations in 1986 that this system was too unpredictable, the NBA effectively limited the Lottery to the top three picks, with the remaining non-playoff teams selecting in the inverse order of their records. As a result, the team with the worst record was assured no worse than the fourth overall pick.⁵⁷

By 1989, the NBA replaced the envelope system with a system of 66 Ping-Pong balls.⁵⁸ In this system, each ball would display one of the non-playoff teams' logos, and picks one through three would depend on which ball popped out of an air-pressured drum. More important than the shift from envelopes to Ping-Pong balls, however, was the institution of a "weighted" system for picks one through three, so that the team with the worst record had a greater chance than any other team to obtain the first overall pick (and if it did not obtain the first overall pick, it would then possess the greatest chance to acquire the second overall pick). To illustrate the "weighting" process, the team with the worst record would receive 11 out of the 66 balls, while the second-worst team would receive 10, and the non-playoff team with the best record would receive only one. Mathematically, however, while the worst placed team had the greatest chance to secure the first pick, it only had about a 17% chance of doing so.⁵⁹

Despite such re-weighting, seeming inequities remained, particularly as expansion allowed more teams to enter the NBA – and thus more teams to enter the Lottery. Although not an expansion team, the Seattle Supersonics barely missed the playoffs in 1990, but were lucky enough to obtain the number two overall pick in the NBA Draft. More vividly, the Orlando Magic secured the number one overall pick in 1992 and then again in 1993, even when in the latter season the Magic had the best record (41–41) of any non-playoff team. To be truthful, the Magic secured the number one pick in 1993 when it had only a one in 66 chance (or a 1.5% chance) of obtaining it, though perceptions of unfairness lingered.⁶⁰

⁵⁵ Michael Murphy, *NBA Draft: Lotto Luck*, *Hous. Chron.*, May 21, 2000, at 19.

⁵⁶ John Hillyer, *Warriors hope to save face in lottery*, *S.F. Examiner*, May 21, 1995, at D3.

⁵⁷ Murphy, *supra* note 27.

⁵⁸ L.C. Johnson, *Magic hope to beat odds—again*, *Orlando Sentinel Trib.*, May 10, 1998, at C1.

⁵⁹ Hillyer, *supra* note 56.

⁶⁰ *Id.*

In its latest attempt to minimize claims of injustice, the NBA reconfigured both the Lottery's weighting formula and its selection methodology in 1993. Instead of selecting one of 66 Ping-Pong balls that bear a team logo, the NBA presently employs a 14 Ping-Pong ball system, with each ball numbered from one to 14. Using an air-pressured drum, the NBA Commissioner draws four of the balls to the top, thus yielding a four-digit sequence that has already been assigned to one of the lottery teams.⁶¹ In total, there are 1,001 combinations, with the last place team controlling 250 of those combinations, thereby possessing a 24.99% chance of winning the top pick (and 21.55% for the second pick and 17.84% for the third pick); the team with the second worst record controls 200 combinations; and the lottery team with the best record receives only five combinations, or merely a .499% chance of winning the top pick.⁶² Practically, the NBA has made it virtually impossible for another Orlando Magic circa 1993 from reoccurring, and has improved the probability of the worst team obtaining the number one pick from 17% to 25%.

⁶¹ Frank Isola, *Lottery Takes its Chances*, Daily News, May 19, 2002, at 68.

⁶² Nunyo Demasio, *Sonics angle for a rock-solid pick in draft lottery*, Seattle Times, May 19, 2001, at D1.

TABLE 5: NBA DRAFT LOTTERY PROBABILITIES

NBA Team with the ...	Number of Ping-Pong Balls	Likelihood of Obtaining 1 st Pick Overall	Likelihood of Obtaining 2 nd Pick Overall	Likelihood of Obtaining 3 rd Pick Overall	Cumulative Likelihood of Obtaining 1 st , 2 nd , or 3 rd Pick Overall
worst record	250	25.00%	21.55%	17.84%	64.39%
2 nd worst record	200	20.00%	18.91%	17.22%	56.13%
3 rd worst record	157	15.70%	15.84%	15.70%	47.24%
4 th worst record	120	12.00%	12.71%	13.43%	38.14%
5 th worst record	89	8.90%	9.77%	10.82%	29.49%
6 th worst record	64	6.40%	7.21%	8.26%	21.87%
7 th worst record	44	4.40%	5.06%	5.93%	15.39%
8 th worst record	29	2.90%	3.38%	4.03%	10.31%
9 th worst record	18	1.80%	2.12%	2.56%	6.48%
10 th worst record	11	1.10%	1.30%	1.58%	3.98%
11 th worst record	07	0.70%	0.83%	1.02%	2.55%
12 th worst record	06	0.60%	0.71%	0.87%	2.18%
13 th worst record	05	0.50%	0.60%	0.73%	1.83%

Regardless of its present incarnation, the NBA Draft is the exclusive means by which desirable amateur players can enter the NBA. As noted earlier, the only limit to the NBA Draft's exclusivity pertains to undrafted players, whose ability to "bargain" with multiple NBA teams derives solely from the fact that no NBA team wanted to select them in the NBA Draft.⁶³

B. Reaffirming Exclusivity & Normalizing Draft Rights (January 1999–Present)

Given the NBA Draft's controversial history and frequent metamorphosis, it should come as no surprise that the 1999 CBA provides intricate guidelines for NBA hopefuls. Reaffirming the exclusivity of the NBA Draft, Article X(3)(a) stipulates, "a team that drafts a player shall, during the period from the date of such NBA Draft to the date of the next Draft, be the only Team with which such player may negotiate or sign a Player Contract."⁶⁴ In terms of NBA Draft eligibility, Article X(5)(a) limits eligibility to those amateur players who have either graduated from high school or who have received the equivalence of a high school diploma.⁶⁵ Provided they are eligible, amateur players can "declare" for the NBA Draft by renouncing their collegiate eligibility at least 45 days prior to the NBA Draft.⁶⁶

Aside from issues of exclusivity and eligibility, the National Collegiate Athletic Association ("NCAA"), a private, unincorporated association which administers intercollegiate athletics, imposes harsh penalties on all amateur players who declare for the NBA Draft and reach financial agreements with agents. Whether they are high school players or college underclassmen, these players irrevocably forfeit their collegiate eligibility, even if they are not selected in the NBA Draft.⁶⁷

In contrast, the NCAA has employed varying rules for amateur players who declare for the NBA Draft but do not reach financial arrangements with agents ("unrepresented college underclassmen" or "unrepresented high school players").⁶⁸ With respect to unrepresented college underclassmen, they have

⁶³ Consequently, most undrafted players rarely make the NBA, and those lucky enough to do so sign for the NBA minimum. *Id.*

⁶⁴ 1999 Collective Bargaining Agreement, *supra* note 20, at Art. X(3)(a), available at <http://www.nbpa.com/cba/articleX.html#section3> (last visited Feb. 1, 2004).

⁶⁵ *Id.* at Art. X(5)(a), available at <http://www.nbpa.com/cba/articleX.html#section5> (last visited Feb. 1, 2004).

⁶⁶ *Id.*

⁶⁷ Andy Katz, Rule creates tough choices for players, programs, ESPN.com, Apr. 27, 2002, at <http://espn.go.com/ncb/news/2002/0425/1374039.html> (last visited Feb., 2004).

⁶⁸ A "financial arrangement with an agent" has been broadly defined. For instance, Amare Stoudemire likely forfeited his collegiate eligibility when his mother received cash from a Nike representative.

until a week prior to the NBA Draft to renounce their declaration, which in turn removes their names from the group of amateur players available for the NBA Draft and, more importantly, preserves their collegiate eligibility.⁶⁹ Even if they remain declared for the NBA Draft, they can still preserve their collegiate eligibility by notifying the NBA of their intent to return to college within 30 days following the NBA Draft.⁷⁰ This is true even if they are drafted, though according to the 1999 CBA, they remain the property of the NBA team that had selected them for one year following the date when, absent renunciation of collegiate eligibility, they would have been eligible for the NBA Draft.⁷¹

Until April 2002, unrepresented high school players were afforded no opportunity for "second thoughts" or unrealistic expectations. Instead, all high school players immediately and irrevocably forfeited their collegiate eligibility upon declaring for the NBA Draft.⁷² Proponents of the disparity in treatment between unrepresented high school players and unrepresented college underclassmen believed the potentially harsher consequences imposed on the former would encourage them to at least start college rather than risk going undrafted having already forfeited their collegiate eligibility.⁷³

In April 2002, the NCAA significantly modified its rules for unrepresented high school players ("April 2002 modifications"). First, in harmony with its rule for unrepresented college underclassmen, the NCAA now allows unrepresented high school players to declare for the NBA Draft and then remove themselves

ESPN.com, Draft Ticker, at <http://sports.espn.go.com/nbadraft/tracker/player?playerId=18345> (last visited Feb. 1, 2004).

⁶⁹ Michael Pointer, Purdue's Deane tests his standing for NBA, *Indianapolis Star*, May 17, 2002, at D1.

⁷⁰ Phil Axelrod, Early Pro Entrants Affect NCAA Quality, *Pitt. Post-Gazette*, May 13, 2002, at C10.

⁷¹ 1999 Collective Bargaining Agreement, *supra* note 20, at Art. X(5)(a)(ii), available at <http://www.nbpa.com/cba/articleX.html#section5> (last visited Feb. 1, 2004). For example, Marcus Camby, prior to declaring for the 1996 NBA Draft, contemplated the option of being drafted and then returning to the University of Massachusetts for his senior year. Joc Burris, Camby Choice Monday, *Boston Globe*, Apr. 27, 1996, at 57.

⁷² Katz, *supra* note 67. This rule also applied to junior college players who declared for the NBA Draft.

⁷³ According to Steve Malonee, a spokesman for the NCAA, the harsher penalty on high school players was created to encourage them to at least start college. Peter May, Out of his League, *Boston Globe*, Oct. 6, 1996, at C1. Moreover, the current CBA stipulates that high school players whose classes had not graduated by the end of June are not eligible to be selected. Practically, therefore, high school juniors cannot declare themselves for the draft. Also, a 17-year-old, unlike an 18-year-old, is generally considered a minor, cannot vote, and has certain work restrictions imposed on him, all of which restrict his ability to earn a living. Greg Mattura, Next Legal Hurdle? If 11th Graders Try for NBA, *Rec. (Bergen County, NJ)*, July 12, 2001, at S5.

from consideration up until one week prior the NBA Draft.⁷⁴ Second, unrepresented high school players who are not drafted incur no penalty by having declared for the NBA Draft; these players can go on to play Division I college basketball.⁷⁵ Third, unrepresented high school players who are drafted have until the start of their college classes in the fall to retain their collegiate eligibility, provided they have not signed contracts with the NBA teams that had selected them.⁷⁶ Put simply, high school players can now be drafted but still attend college and play Division I college basketball. Because the April 2002 modifications remove the immediate penalty of declaring for the NBA Draft, a number of college basketball coaches complain that many more high school basketball players will now declare.⁷⁷

Table 6 explains the evolution of NCAA rules for NBA Draft declarants.

⁷⁴ Robyn Norwood, *Eligibility Rule Moves Ahead*, L.A. Times, Apr. 10, 2002, § Sports, at 5.

⁷⁵ This assumes they have attracted the interest of Division I colleges. Taj McDavid, for instance, declared for the 1996 NBA Draft, thereby immediately forfeiting his collegiate eligibility under the previous NCAA rules. Not one Division I college basketball team recruited McDavid, however, so he essentially sacrificed nothing by declaring.

⁷⁶ Katz, *supra* note 67. According to Jane Jankowski, a spokeswoman for the NCAA, "This rule gives high school athletes more flexibility to determine what their future will be." Greg Schain, *High schoolers can now declare for NBA draft*, University Wire, May 10, 2002. See also Frank Burilson, *New Rules Will Make a Mess*, Foxsports.com, Apr. 25, 2002, available at <http://foxsports.lycos.com/content/view?contentId=461224>.

⁷⁷ For instance, both San Diego State Coach Steve Fisher and Syracuse Coach Jim Boeheim have made this complaint. Canepa, *supra* note 41.

TABLE 6: NCAA RULES FOR NBA DRAFT DECLARANTS

<u>THIS PERSON DECLARES FOR NBA DRAFT</u>	<u>SIGNS WITH AGENT</u>	<u>DOES NOT SIGN WITH AGENT (RULE BEFORE APRIL 2002)</u>	<u>DOES NOT SIGN WITH AGENT (RULE AFTER APRIL 2002)</u>
HIGH SCHOOL SENIOR	* Immediately forfeits eligibility to play Division I college basketball.	* Immediately forfeits eligibility to play Division I college basketball.	<p>* No immediate penalty.</p> <p>* May withdraw from consideration up until 1 week prior to draft.</p> <p>* If he participates in draft and goes undrafted, he still can go on and play Division I college basketball.</p> <p>* If he participates in draft and is drafted, he has until the start of fall college classes to notify NCCA of intent to attend college, but team which drafts him controls his rights.</p>
COLLEGE UNDERCLASSMEN	* Immediately forfeits eligibility to play Division I college basketball.	<p>* No immediate penalty.</p> <p>* May have withdrawn from consideration up until 1 week prior to draft.</p> <p>* If he participated in draft and went undrafted, he had until 30 days following draft to notify NCAA of intent to return to college.</p> <p>* If he participated in draft and was drafted, he had until 30 days following draft to notify NCCA of intent to return to college, but team which drafted him controlled his rights.</p>	<p>* No immediate penalty.</p> <p>* May withdraw from consideration up until 1 week prior to draft.</p> <p>* If he participates in draft and goes undrafted, he has until 30 days following draft to notify NCAA of intent to return to college.</p> <p>* If he participates in draft and is drafted, he has until 30 days following draft to notify NCCA of intent to return to college, but team which drafts him controls his rights.</p>

Significantly limiting the practical impact of the April 2002 modifications,

however, drafted high school players are locked into their draft position, and to the NBA team which selected them, after they leave college. In other words, even if a drafted high school player attends college, hones his basketball skills, and becomes more desirable to NBA teams, he cannot participate in a subsequent NBA Draft in hopes of becoming a higher draft pick—and thus earn more money.⁷⁸ Essentially, the April 2002 modifications impose a new penalty on unrepresented high school players: If they are drafted, but attend college and become better players, they do not receive any financial benefit for their improvement when they sign their first NBA contracts.

Three provisions of the 1999 CBA only exacerbate this penalty. First, Article X(5)(a)(ii) stipulates that a drafted player who thereafter plays intercollegiate basketball remains the property of the NBA team for one year following the date when, absent renunciation of his collegiate eligibility, he would have first been eligible for the NBA Draft—in other words, one year after he would have graduated from college.⁷⁹ As a result, a drafted high school player who attends college for one year and then decides to enter the NBA would have to wait four years before he can negotiate his initial NBA contract with a different NBA team than the one that had drafted him. Even assuming this player refuses to sign for those four years, he would still be eligible to be drafted again, except this time in the NBA Draft that would occur five years after the occurrence of his last NBA Draft experience.⁸⁰ Second, and perhaps more damaging, Article I(rrr) credits an NBA player with a year of service in the NBA for each year that he is signed to an NBA team, so a drafted high school player who attends college receives no “time served” for his collegiate play.⁸¹ This is of particular importance to a player’s total career earning potential, since it is significantly impacted by the age at which he can become an unrestricted free agent.⁸² Finally, Article X(3)(f) dictates that an NBA team is under no obligation to sign its draft picks, meaning that if a drafted high school player attends college and performs below expectations, the NBA team that had

⁷⁸ Mark Asher, *NBA-Bound Prep Players Can Retain Their NCAA Eligibility*, Wash. Post, Apr. 26, 2002, at D03.

⁷⁹ 1999 Collective Bargaining Agreement, *supra* note 29, at Article X(5)(a)(ii), available at <http://www.nbpa.com/cba/articleX.html#section5> (last visited Feb. 1, 2004). Note also that if the player was “red-shirted,” which means he was allowed to begin college classes but not able to play and thus not use one of his four years of collegiate eligibility, another year would be added.

⁸⁰ In this instance, since the player has exhausted his collegiate eligibility, the second team that drafts him would only hold his rights for one year. See *infra* note 50.

⁸¹ 1999 Collective Bargaining Agreement, *supra* note 20, at Art. I (rrr), available at <http://www.nbpa.com/cba/articleI.html#rrr> (last visited Feb. 1, 2004).

⁸² See *infra*.

selected him may choose not to sign him.⁸³

To illustrate these points, imagine the following hypothetical (and see Table 7): At the 2004 NBA Draft, the Sacramento Kings, with the last pick in the first round, select Al Jefferson, an unrepresented high school player from Prentiss, Missouri. Whenever he enters the NBA, Jefferson may only sign for the pay slotted for being the last pick in the first round. Instead of signing immediately in 2004, however, Jefferson believes that by attending the University of Arkansas, which had offered him a full scholarship, he would obtain more playing time and thus a greater opportunity to become a better player. By the end of his freshman year, Jefferson appears to have made the right decision, as he has become the most coveted amateur player—and thus worthy of being the number one overall pick in the 2005 NBA Draft. Jefferson, however, cannot enter the 2005 NBA Draft, for the Sacramento Kings already hold his rights. Nor can Jefferson expect to earn \$20.3 million over four seasons, which is the amount he would have likely earned as the first player selected in the 2005 NBA Draft.⁸⁴ Instead, assuming Jefferson chooses to enter the NBA in 2005, he can only earn a maximum of \$4.6 million over his first four seasons.⁸⁵ Perhaps even more costly, Jefferson delays his NBA career by the number of years he spends in college, and thus delays his access to unrestricted free agency by that amount of time as well. Alternatively, if Jefferson attends the University of Arkansas and plays poorly, the Sacramento Kings may choose not to sign him. Considering these drawbacks, it should come as no surprise that Deputy Commissioner Granik has remarked, “I don’t think anybody would do this if they understood how the rules work.”⁸⁶

⁸³ 1999 Collective Bargaining Agreement, *supra* note 20, at Article X(3)(f), available at <http://www.nba.com/cba/articleX.html#section3> (last visited Feb. 1, 2004).

⁸⁴ This figure assumes that the 2005 first overall pick, like all first overall picks thus far under the 1999 CBA, is able to negotiate a 20% annual increase of each year slotted, meaning he will earn the following salaries: first year: \$4,348,157; second year: \$4,672,886; third year: \$4,998,989, and since his fourth year salary will be a 26.1% increase of his third year salary, he will earn \$6,303,725 during his fourth year. In total, he earns \$20,323,757. *Id.* at Exhibit B, available at <http://www.nba.com/cba/exhibits/exhibitB.html> (last visited April 1, 2003) (note that while Exhibit B does not indicate assigned salaries for players selected in the first round of the 2005 draft, salaries assigned to each draft position increase by 4% each year).

⁸⁵ This figure assumes that the last pick in the first round of the 2004 NBA Draft is able to negotiate a 120% annual increase of each year slotted, thus earning the following salaries: first year \$868,982; second year: \$934,128; third year: \$999,274, and since his fourth year salary will be a 80.5% increase of his third year salary, he will earn \$1,803,690 during his fourth year—if his team elects to exercise that fourth year option. In total, he earns \$4,606,074. *Id.*

⁸⁶ See Schain, *supra* note 76.

TABLE 7: HYPOTHETICAL OF AL JEFFERSON IN 2004 NBA DRAFT (SEE TEXT ON PAGES 133-34)

SCENARIO FOR AL JEFFERSON, UNREPRESENTED HIGH SCHOOL PLAYER IN 2004 NBA DRAFT	<u>PROS</u>	<u>CONS</u>
<p><u>SCENARIO I</u></p> <p>1) Enters 2004 NBA Draft</p> <p>2) Drafted 29th overall by the Kings</p> <p>3) Signs with the Kings in the summer of 2004.</p>	<ul style="list-style-type: none"> * During summer of 2004, he signs a guaranteed 3-year contract worth \$2.8 million, with a \$1.8 million team option for a 4th year. * Even if he plays poorly in the NBA or suffers a career-ending injury—and never earns another dollar playing basketball—he is still a millionaire for the rest of his life. * Becomes a free agent earlier in his pro career. * Avoids potential of serious injury while playing in college. 	<ul style="list-style-type: none"> * Could have decided not to declare for the 2004 NBA Draft, and attended the University of Arkansas instead. By doing so, he could have played well at Arkansas and thus potentially have been selected higher in the 2005 NBA Draft than he was in the 2004 NBA Draft—but, by doing so, he would have passed up \$2.8 million guaranteed—and delayed access to unrestricted free agency by one year.
<p><u>SCENARIO II</u></p> <p>1) Enters 2004 NBA Draft</p> <p>2) Drafted 29th overall by the Kings</p> <p>3) Does not sign with Kings, but instead attends the University of Arkansas and will play there during 2004-05 college basketball season.</p> <p>4) Plays extremely well at Arkansas during Freshman year and opts to sign with the Kings (who hold his rights) in the summer of 2005.</p>	<ul style="list-style-type: none"> * During summer of 2005, he signs a guaranteed 3-year contract worth \$2.8 million, with a \$1.8 million team option for a 4th year. * Arguably better prepared for the NBA by playing one year of college basketball than he was in Scenario I. 	<ul style="list-style-type: none"> * Reaps no financial reward for his improved play—he remains the property of the Kings, and is obligated to sign for the pay slot allotted to the 29th pick in the Draft (i.e., he cannot enter 2005 NBA Draft in hopes of being selected higher than he was in 2004). * Delays his access to unrestricted free agency by one year.

<p><u>SCENARIO III</u></p> <p>1) Enters 2004 NBA Draft</p> <p>2) Drafted 29th overall by the Kings</p> <p>3) Does not sign with Kings, but instead attends the University of Arkansas</p> <p>4) Plays poorly at Arkansas and Kings choose not to sign him.</p>	<p>* Receives a "free" college education.</p>	<p>* Lost opportunity to receive a guaranteed \$2.8 million.</p> <p>* Enormous regret.</p>
<p><u>SCENARIO IV</u></p> <p>1) Enters 2004 NBA Draft</p> <p>2) Drafted 29th overall by the Kings</p> <p>3) Does not sign with Kings, but instead attends University of Arkansas</p> <p>4) Suffers serious injury while playing at Arkansas and Kings choose not to sign him.</p>	<p>* Receives a "free" college education.</p>	<p>* Lost opportunity to receive a guaranteed \$2.8 million.</p> <p>* Enormous regret.</p> <p>* Who pays for his medical costs?</p>

In practice, the April 2002 modifications only benefit those unrepresented high school players who are not drafted but are capable of playing Division I college basketball. Indeed, these players no longer lose their collegiate eligibility. At first glance, the April 2002 modifications also appear to benefit those unrepresented high school players selected at the beginning of the first round. These players can now attend college and develop their games, yet be assured an initial NBA contract that does not penalize them for improving while in college. Yet, as noted above, a player who attends college delays the onset of his NBA career by however long he attends college, and thus delays the date at which he can become an unrestricted free agent. In all likelihood, therefore, even an unrepresented high school player selected at the beginning of the NBA Draft will immediately sign with the NBA team that drafts him. Simply put, to the extent the April 2002 modifications affect the decision-making process of unrepresented high school players who are drafted, they likely work to the financial detriment of those players.

The April 2002 modifications also seem to defeat the ostensible purpose of the NBA Draft: to help weaker teams. Indeed, because the order of the NBA

Draft is determined by team record, the NBA's best teams select amateur players at the end of each round. Generally, a top NBA team, which already has very good players, will not expect its drafted players to play much initially.⁸⁷ In contrast, a poor NBA team often expects its drafted players to contribute immediately, particularly if they are highly anticipated players selected at the beginning of the first round.⁸⁸ As a result, a top NBA team is more capable than a poor NBA team to use its first round selection on a high school player and to encourage that player to attend college, where he can receive a great deal of playing time. After a year or two of developing his skills, that player can then join the top NBA team as a vastly improved player—ironically, one that would have, had he been eligible for a subsequent NBA Draft, likely been selected by a poor NBA team at the very beginning of that draft. Perhaps even more valuable, if a drafted high school player does not develop in college, the team that drafted him is under no obligation to sign him. Therefore, college basketball becomes a cost-free minor league basketball system for the NBA's best teams, which receive the added benefit of being able to sign those successful high school draft picks at later dates—and at discount rates.

Although the impact of the April 2002 modifications remains to be seen, only five high school players declared for the 2002 NBA Draft, or one fewer than the number of high school players that declared for the 2001 NBA Draft.⁸⁹ In addition, three of those five players signed financial arrangements with agents months before the 2001 NBA Draft, thus losing any potential "benefit" provided by the April 2002 modifications.⁹⁰ A similar pattern emerged for the 2003 NBA Draft, as only six high school players declared for the Draft.⁹¹ Shortly after declaring, five of those players signed financial arrangements with agents. All five of those players were drafted, four in the first round. The sixth, Charlie Villanueva, took advantage of the April 2002 modifications by not signing a financial arrangement with an agent, and by withdrawing from consideration prior to the June 19, 2003 deadline.

⁸⁷ For example, Charlie Ward was selected by the New York Knicks as the second to last pick in the 1994 NBA Draft, and played only 44 minutes during his entire rookie season. John Brennan, Postell Can Only Sit And Wait, Rec. (Bergen County, NJ), Dec. 29, 2000, at S3. Similarly, Joseph Forte was selected by the Boston Celtics as the 21st pick in the 2001 NBA Draft, and was told by his coach, Jim O'Brien, that he would have to wait behind veteran players before obtaining playing time. Gus Martins, C's Rookie Has a Forte: Patience, Boston Herald, Nov. 16, 2001, at 99.

⁸⁸ According to Dave Cowens, former Head Coach of the Golden State Warriors, "When you pick a player No. 5 [overall], he's going to play a lot of minutes." Tony Cooper, Warriors Give Draft the Ol' College Try, S. F. Chron., June 28, 2001, at E1.

⁸⁹ High Schoolers Hold the Key to the Draft, Sporting News, May 28, 2001, at 23.

⁹⁰ For excellent profiles of all NBA Draft prospects, see NBADraft.net.

⁹¹ Those six players were: LeBron James, Travis Outlaw, Ndudi Ebi, Kendrick Perkins, James Lang, and Charlie Villanueva.

He has since accepted a full athletic scholarship from the University of Connecticut, where he is already second on the Huskies in rebounds per game, as well as the recipient of the Big East Rookie of the Week award for the first week of January 2004.⁹²

Thus far, at least, the April 2002 modifications have not yet triggered a rise in the number of high school players declaring. Perhaps replacing the threat of losing one's collegiate eligibility, the fact that improved play will not improve pay may become the new deterrent to those high school players who would be better off going to college. If so, an often-ignored trend will likely continue: High school players who enter the NBA Draft are often the most talented players the NBA Draft has to offer.

III. THE COMPETING INTERESTS OF HIGH SCHOOL PLAYERS & THE NBA

A. Interests of High School Players

High school players capable of entering the NBA directly out of high school possess several important reasons to contest a rule precluding them of the right to enter the NBA Draft. First, when compared with other age cohorts that have declared for the NBA Draft, high school players have an unusually successful track record in the NBA, both on and off the court. Second, superstar high school players have enormous financial incentives, both in the short and long term, to enter the NBA at an early age. Third, superstar high school players who seek to obtain a college education may discover that doing so is difficult when playing on a college basketball team. Finally, by postponing participation in the NBA Draft to a later time, superstar high school players may endanger their attraction to NBA teams, particularly if they fail to meet expectations as college basketball players.

From 1975 to 2003, 29 high school players declared for the NBA Draft.⁹³

⁹² Huskies Report, CBS Sportsline.com, at

<http://cbs.sportsline.com/collegebasketball/teams/report/CT/6457883> (last visited Feb. 1, 2004). See

also Sean O'Rourke, UConn Finally Set to Open Big East Play, *New Britain Herald*, Jan. 6, 2004, available at

http://www.zwire.com/site/news.cfm?newsid=10755365&BRD=1641&PAG=461&dept_id=17739&rfi=6.

⁹³ This count does not include the following six players:

Moses Malone. The first high school player to participate in a professional basketball draft. Malone, who was selected 22nd overall by the Utah Stars in the 1974 American Basketball Association Draft, cannot be counted because he did not participate in the NBA Draft, only the ABA Draft. If we did include him in our total, however, the three-time MVP would have been classified as a "superstar."

Ronnie Fields. Although some NBA commentators regard Fields as an example of a failed high school player who turned pro, this former high school teammate of Kevin Garnett at Farragut High in Chicago did not declare for the NBA Draft directly out of high school in 1996. Instead, he signed a letter of intent to play college basketball at DePaul University, but failed to qualify academically. Rather than sitting out one season as a Prop 48 player, he played professionally for the Rockford Lightning in the Continental Basketball Association during the 1996-97 season, averaging only 7.4 points per game. He was then eligible for the 1997 NBA Draft – after playing one year of professional basketball – but was not drafted. Shooting Guards, Usenet Draft, available at http://www.ibiblio.org/craig/draft/1997_draft/scout/sg.html (last visited Feb. 1, 2004). Since that time, Fields has played in both the Continental Basketball Association and the United States Basketball League. Ray Giler, Fields Hopes to Make Final Jump, USA Today, May 7, 2002, available at <http://www.usatoday.com/sports/preps/basketba/2002-05-08-fields.htm#more>. He had recent success in the USBL: during the 2002-03 season, he ranked 13th in the league in scoring (16 points per game) and fifth in steals (2 steals per game). USBL.com, 2003 Stat Guide, at <http://www.usbl.com/2003StatGuide.pdf> (last visited Feb. 1, 2004). For the 2003-04 season he has returned to play for the Rockford Lightning in the CBA, where he currently leads the league in scoring (26 points per game). CBAhoopsonline.com, League Leaders, at <http://www.cbaonline.com/stats/leagueleaders.php> (last visited Feb. 1, 2004). If included, he would have been classified as a “minor leaguer.”

Stephen Jackson. Like Ronnie Fields, Jackson is often erroneously regarded as a high school player who declared for the NBA Draft. In truth, this former Oak Hill Academy star graduated from high school in 1996, and then rescinded his letter of intent to play at Arizona because of poor grades, only to enroll at Baylor Community College in Kansas. Though he did not play at Baylor Community College, he declared for the 1997 NBA after enrolling, thus making him a college student who declared for the 1997 NBA Draft, where he was drafted 43rd overall (second round) by the Phoenix Suns. After failing to make the Suns’ roster in 1997, he played professionally in Venezuela and the Dominican Republic. Team Make Final Cuts on Eve of Regular Season Openers, Roswell Daily Rec., Oct. 31, 2000, available at <http://www.roswell-record.com/archives/103100/spt04.html>. Though he made another failed attempt to make the NBA at the Vancouver Grizzlies’ 1999 training camp, Jackson eventually made it to the NBA with the New Jersey Nets in 2000, and later moved onto the San Antonio Spurs, where during the 2002-03 season, he averaged 28 minutes, 12 points, and 4 rebounds a game. ESPN.com, NBA Player Statistics (Stephen Jackson), at <http://sports.espn.go.com/nba/players/profile?statsId=3210> (last visited Feb. 1, 2004). In October 2003, he signed a two-year contract with the Atlanta Hawks for \$2.1 million, and thus far in the 2003-04 season, he has posted career high averages in points (14) and minutes (35) per game. Id. If included, he would have been classified as “serviceable.”

Brandon Roy: Declared for the 2002 NBA Draft but did not sign with an agent. As a result, he could – and did – take advantage of the April 2002 modifications and did not lose his collegiate eligibility. He also withdrew from the 2002 NBA Draft on June 17, 2002, which was nine days prior to its occurrence, and he did not attend pre-draft camps. Played at Garfield High School (WA), where he was a two-time conference most valuable player, and was widely regarded as one of the nation’s top 50 high school basketball prospects. Roy is presently a student at the University of Washington, where he received a full scholarship for basketball, and is a member of the school’s men’s basketball team, which is a Division I program. He did not play during the 2002-03 season, however, because he did not secure the requisite standardized test score for eligibility. Yet now in the 2003-04 season, he has become one of the Huskies’ best players, and as the starting small forward Roy leads his team in minutes and is second in both scoring and rebounding. University of Washington Homepage, Brandon Roy Declared Eligible by NCAA, Jan. 16, 2003, at

The following is a brief summary of how these 29 players have fared, and for those declaring between 1975 to 2001, each is classified with one of five classifications ranging from “superstar,” “star,” “serviceable,” “fringe,” “minor leaguer,” to “bust.”⁹⁴ This Article declines to classify those high school players who declared for the 2002 and 2003 NBA Drafts since it is too early to label them fairly.

1. Darryl Dawkins: Selected 5th overall (first round) in the 1975 NBA Draft by the Philadelphia 76ers out of Maynard Evans High School (FL). First high school player to declare for the NBA Draft. Played 14 seasons in the NBA. Retired as the fifth most accurate shooter in NBA history, and recorded

<http://gohuskies.ocsn.com/sports/m-baskbl/spec-rel/011603aaa.html>; see also The Insiders, Brandon Roy: Back To School, June 18, 2002, at <http://hs.washington.theinsiders.com/2/51323.html>; ESPN.com, Player Statistics University of Washington), at <http://sports.espn.go.com/ncb/teamstats?teamId=264> (last visited Feb. 1, 2004).

Giedrius Rinkevicius: Declared for the 2002 NBA Draft out of Bridgton Academy (Maine), but took advantage of the April 2002 modifications by not signing with an agent and by withdrawing prior to the deadline for early entrants. Signed letter of intent to play at the University of Missouri, but did not secure the requisite standardized test score for eligibility, and instead matriculated to Collin County Community College (Texas), where he played for the men's basketball team in 2002–03. He then left Collin County Community College in 2003 to play professionally in Lithuania this season. Eurobasketball, at <http://www.eurobasket.lt/team.php?id=486> (last visited Feb. 1, 2004).

Charlie Villanueva: Declared for the 2003 NBA Draft out of Blair Academy (New Jersey), but took advantage of the April 2002 modifications by not signing with an agent and by withdrawing prior to the deadline for early entrants. He was ranked by ESPN as the third most promising high school basketball player—and the most promising power forward—for 2003. Matriculated at the University of Connecticut, where he has already become the Huskies' second leading rebounder. ESPN.com, Player Statistics University of Connecticut, at <http://sports.espn.go.com/ncb/teamstats?teamId=41> (last visited Feb. 1, 2004). He also has his own website: <http://www.charlievillanueva.org>.

⁹⁴ I define the classifications as follows:

- Superstar: One of the NBA's best 15 players.
- Star: Not one of the NBA's best 15 players, but either the best or second-best player on the player's team.
- Serviceable: A regular contributor to a player's NBA team; usually is anywhere from the third best to the ninth best player on a team.
- Fringe: A player who plays infrequently, if not rarely; usually one of the last players on an NBA team's bench.
- Minor Leaguer: A player who plays professionally either abroad, or in one of the American minor basketball leagues.
- Bust: A player who no longer earns an income playing basketball.

8,733 points, 4,432 rebounds, and 1,023 blocked shots.⁹⁵ Classification: Star.

2. Bill Willoughby: Selected 19th overall (second round) in the 1975 NBA Draft by the Atlanta Hawks out of Dwight Morrow High School (NJ). Signed a \$1 million contract. Played eight seasons, averaging only 6 points per game while playing for six different teams. Some attribute his uninspiring career as the main reason for the 18-year absence of high school players declaring for the NBA Draft from 1976 to 1994. Earned his college degree at the age of 44.⁹⁶ Classification: Fringe.
3. Kevin Garnett: Selected 5th overall (first round) in the 1995 NBA Draft by the Minnesota Timberwolves out of Farragut Academy (Ill.). At age 21, signed the most lucrative contract in NBA history: a five-year, \$126 million deal. At age 27, signed a five-year extension worth \$100 million. Earns an additional \$25 million a year in endorsements. A seven-time All-Star selection. Recently named by *The Sporting News* as the fifth best player in the NBA.⁹⁷ Classification: Superstar.
4. Kobe Bryant: Selected 13th overall (first round) in the 1996 NBA Draft by the Charlotte Hornets out of Lower Merion High School (PA), then immediately traded to the Los Angeles Lakers. At age 20, became the youngest All-Star in League history. Along with Shaquille O'Neal, Bryant has led the Lakers to three consecutive NBA Championships. Recently named by *The Sporting News* as the second best player in the NBA.⁹⁸ Currently contesting an indictment that he sexually assaulted a 19 year-old woman in Colorado. Classification: Superstar.
5. Jermaine O'Neal: Selected 17th overall (first round) in the 1996 NBA Draft by the Portland Trailblazers out of Eau Claire High School (SC). After struggling for his first four seasons, during which he averaged only 11 minutes and four points per game, he was traded to the Indiana Pacers. After joining the Pacers, O'Neal blossomed into an All-Star, and the Pacers

⁹⁵ Anwar S. Richardson, Dawkins to Coach in Tampa, Tampa Trib., Mar. 21, 2000, at 1.

⁹⁶ Wayne Drehs, Lure of Stardom can Glitter Like Fake Gold, ESPN.com, June 20, 2001, at <http://espn.go.com/nba/draft2001/s/2001/0618/1215705.html>; see also Rick Gano, Ready or Not, Six High Schoolers off to NBA, Associated Press, June 16, 2001, available at LEXIS, News Library.

⁹⁷ Sean Deveney, Immovable Object, Sporting News, Mar. 3, 2003 at 10.

⁹⁸ Id.

rewarded him with a four-year \$25 million contract extension.⁹⁹ Most recently, O'Neal signed a seven-year, \$120 million contract extension.¹⁰⁰ Recently named by *The Sporting News* as the 11th best player in the NBA.¹⁰¹ Classification: Superstar.

6. Taj (Red) McDavid: Not drafted by a NBA team in the 1996 NBA Draft out of Palmetto High School (SC). Also rejected by both American minor leagues and European basketball leagues. Revealingly, less than four months after the NBA conducted its draft, the Continental Basketball Association, a minor league, conducted its seven round, 81-selection minor league draft, and not one of those selections was McDavid.¹⁰² After failing to find a basketball employer, McDavid returned home to Williamstown, South Carolina, where he lives with his parents in their mobile home and can often be found playing pick up basketball.¹⁰³ Classification: Bust.
7. Tracy McGrady: Selected 9th overall (first round) in the 1997 NBA Draft by the Toronto Raptors out of Mount Zion Christian Academy (NC). At age 21, signed a seven-year, \$91 million contract with the Orlando Magic, which at the time was the maximum allowable under the 1999 CBA. Won the NBA's scoring title in the 2002-03 season, averaging a robust 32 points per game,¹⁰⁴ and ranked fourth in the NBA's Most Valuable Player award.¹⁰⁵ Recently named by *The Sporting News* as the fourth best player in the NBA.¹⁰⁶ Classification: Superstar.
8. Al Harrington: Selected 25th overall (first round) in the 1998 NBA Draft by the Indiana Pacers out of St. Patrick's High School (NJ). Progressed slowly over his first three seasons, though the Pacers rewarded him in November

⁹⁹ John Niyo, *League Riches Lure Kids*, June 1, 2001, *Det. News*, available at <http://www.detnews.com/2001/pistons/0106/12/e01-235452.htm>.

¹⁰⁰ Associated Press, *Pacers sign promising O'Neal to seven-year deal*, July 16, 2003, available at <http://espn.go.com/nba/news/2003/0716/1581648.html>.

¹⁰¹ Dan Graf, *The New 1-2*, *Sporting News*, Mar. 4, 2002, at 13.

¹⁰² May, *supra* note 73.

¹⁰³ Drehs, *supra* note 96; see also Ira Berkow, *They're Still Waiting For an NBA Payday*, *NY Times*, June 24, 2001, § 8, at 1.

¹⁰⁴ ESPN.com, *NBA Player Statistics (Tracy McGrady)*, at <http://sports.espn.go.com/nba/players/profile?statsId=3179> (last visited Feb. 1, 2004).

¹⁰⁵ USA Basketball.com, *Player Bio (Tracy McGrady)*, at http://www.usabasketball.com/biosmen/tracy_mcgrady_bio.html (last visited Feb. 1, 2004); see also Judith Evans, *Old Hands at Being Young*, *Wash. Post*, Aug. 9, 2001, at D01.

¹⁰⁶ Graf, *supra* note 101, at 8.

2001 with a four-year \$24 million contract extension.¹⁰⁷ During the 2001–02 season, Harrington proved his worth, as he emerged into a solid contributor for the Pacers, averaging 30 minutes, 13 points, and 6 rebounds per game. He followed up his solid 2001–02 campaign with a nearly identical 2002–03 season, averaging 30 minutes, 12 points, and 6 rebounds a game.¹⁰⁸ Thus far, the 2003–04 season has proved to be Harrington's best, as evidenced by averaging 31 minutes, 13 points, and 7 rebounds per game. Classification: Serviceable.

9. Rashard Lewis: Selected 32nd overall (second round) in the 1998 NBA Draft by the Seattle Supersonics out of Alief Elsik High School (TX). Because he was a second-round pick, Lewis was not assured a spot on the roster, though he played well in training camp and earned a one-year contract for the NBA minimum. Lewis quickly blossomed into a very good player, however, and after his second season signed a three-year, \$13 million contract, though wisely negotiated for an opt-out clause enabling him to become an unrestricted free agent in the summer of 2002.¹⁰⁹ After signing the extension, Lewis positioned himself for a large payday in the 2002 summer, as during the 2001–02 season, he averaged 17 points and 7 rebounds per game. As a reward for his play, the Supersonics signed him to a seven-year contract worth a base of \$60 million, with up to an additional \$15 million in incentives.¹¹⁰ He proved his worth during the 2002–03 season, averaging 18 points and 7 rebounds a game, and he has continued to progress in the 2003–04 season, thus far averaging 19 points and 7 rebounds per game.¹¹¹ Classification: Star.
10. Korleone Young: Selected 40th overall (second round) in the 1998 NBA Draft by the Detroit Pistons out of Hargrave Military Academy (VA). Earned a spot on the roster, and signed for the NBA minimum (\$287,500 in

¹⁰⁷ Seven NBA Players are First to Join U.S. Team, *Seattle Post-Intelligencer*, Nov. 2, 2001, at C6.

¹⁰⁸ ESPN.com, NBA Player Statistics (Al Harrington), at <http://sports.espn.go.com/nba/players/statistics?statsId=3268> (last visited Feb. 1, 2004).

¹⁰⁹ Branson Wright, Jordan Will Keep "Learning" Another Year, *Plain Dealer*, Jan. 20, 2002, at C9.

¹¹⁰ See Jayda Evans, Rashard Lewis gets 7-year deal to remain with Sonics, available at http://seattletimes.nwsource.com/html/sports/134539000_soni20.html. Note that because Lewis is becoming a free agent, his next contract will not be an extension and thus not constrained by the 1999 CBA's rule on contract extensions. Frank Hughes, Sonics' Success Could Prove Costly, *Scripps How. News Service*, Feb. 26, 2002, available at LEXIS, News Library.

¹¹¹ ESPN.com, Player Statistics (Rashard Lewis), at <http://sports.espn.go.com/nba/players/statistics?statsId=3275> (last visited Feb. 1, 2004).

1998). Appearing in only three of 82 games during the 1998–99 season, Young struggled badly, and he was released by the Pistons at the conclusion of the season. Since that time, Young has played in two minor leagues, the Continental Basketball Association and the International Basketball Association, achieving only marginal success.¹¹² In the 2001–02 season, however, Young went overseas, signing a contract to play in the National Basketball League, Australia's top professional basketball association. Unfortunately, Young tore his Achilles tendon in the first game of the season, forcing him to miss the remainder of his team's games.¹¹³ In 2002, Young initially returned to the U.S. to play for the Sioux Falls Skyforce of the Continental Basketball Association, where he played well, averaging 16 points and 7 rebounds a game. His play for the Skyforce attracted the Avtodor Saratov of the Russian A Superleague, and in December 2002, Young signed to play in Russia and continued his overseas professional basketball career.¹¹⁴ Young played well for Avtodor Saratov, averaging 19 points per game, in 29 minutes per game, and he continues to play in Russia this season.¹¹⁵ Classification: Minor Leaguer.

11. Ellis Richardson: Not drafted by a NBA team in the 1998 NBA Draft out of Polytechnic High School (CA). Has not played professional basketball, and has run into serious legal trouble. The worst example of a high school player turning pro, he spent eight months in prison after being convicted on robbery charges.¹¹⁶ Classification: Bust.
12. Jonathan Bender: Selected 5th overall (first round) in the 1999 NBA Draft by the Toronto Raptors out of Picayune High School (MS), then immediately traded to the Indiana Pacers. Like his teammates Harrington and O'Neal, Bender struggled during his first three seasons in the NBA, though his statistics increased appreciably during the 2001–02 season (when he averaged 7 points and 3 rebounds per game in contrast to the 3 points and 1 rebound per game during the preceding season).¹¹⁷ Most observers

¹¹² Drehs, *supra* note 96.

¹¹³ Chris Wilson, Banks Turns it on in Masterly Show, *Canberra Times* (Austl.), Dec. 24, 2001 at A21.

¹¹⁴ Eurobasketball.com, Player Profile (Korleone Young), at

<http://www.eurobasket.com/RUSplayer.asp?PlayerID=17828> (last visited Feb. 1, 2004).

¹¹⁵ E-Basketball.com, Player Statistics (Korleone Young), at <http://e-basket.pl/?podpoddzial=125&zaw=4017> (last visited Feb. 1, 2004).

¹¹⁶ Drehs, *supra* note 96.

¹¹⁷ ESPN.com, NBA Player Statistics (Jonathan Bender), at

<http://sports.espn.go.com/nba/players/statistics?statsId=3328> (last visited Feb. 1, 2004).

speculated that Bender, like most other high school draft picks, would emerge during his fourth season,¹¹⁸ although he suffered a serious knee injury in December 2002, thereby limiting his playing time. Even if he does not, as columnist Michael Murphy of the *Houston Chronicle* notes, "Bender keeps cashing his guaranteed checks."¹¹⁹ Indeed, by simply being the fifth pick in the 1999 NBA Draft, Bender received a three-year deal worth over \$7 million dollars,¹²⁰ and the Pacers picked up his option for the fourth season, thereby netting him another \$3 million.¹²¹ Classification: Serviceable.

13. Leon Smith: Selected 29th overall (first round) in the 2000 NBA Draft by the San Antonio Spurs out of King High School (IL) and then immediately traded to the Dallas Mavericks. Experienced serious personal difficulties. After being drafted, he attempted suicide upon an arrest for brandishing a gun and for vandalizing the car of his estranged girlfriend's mother. Later institutionalized. The Mavericks released him, though prior to doing so, agreed to pay him \$145,000 over 10 years.¹²² Turned both his life and career around in 2001, however, first by joining the Gary (IN) Steelheads of the Continental Basketball Association. Playing for the Steelheads, Smith dominated the competition: after the first few months of the season, he was leading the league in rebounds per game (16 rebounds per game), as well as being the 15th most prolific scorer (17 points) and 5th most prolific shot-blocker (1.3 blocks).¹²³ As a second step, the Atlanta Hawks rewarded him for his accomplishments in the Continental Basketball Association, and brought him to the NBA by signing him to a one-year contract in February 2002. He appeared in only 14 games, averaging 2 points and 1 rebound a game.¹²⁴ During the 2002 off season, the Hawks traded Smith, along with Toni Kukoc and a first round pick in the 2003 NBA Draft in exchange for Glen Robinson. Shortly thereafter, the Bucks waived Smith. Smith then played for the Los Angeles Lakers' 2003 summer league team, averaging 6

¹¹⁸ According to former teammate Mark Jackson, "Jonathan Bender is going to be one heck of a player." Mark Heisler, *Playoff Fight Getting Literal in Payton Place*, L.A. Times, Apr. 2, 2002, at D5.

¹¹⁹ Murphy, *supra* note 27.

¹²⁰ Hardaway's Wish has a Sunny Ending, *Chi. Trib.* Aug. 6, 1999, at N4.

¹²¹ 1999 Collective Bargaining Agreement, *supra* note 20, at Exhibit B, available at <http://www.nbpa.com/cba/exhibits/exhibitB.html> (last visited Feb. 1, 2004).

¹²² Scott Merkin, *It May be his Last Chance*, *Chi. Trib.*, Nov. 19, 2001, at N1.

¹²³ Hawks sign Smith for Rest of Season, *Atlanta J. & Const.*, Mar. 7, 2002, at 14E.

¹²⁴ ESPN.com, NBA Player Statistics (Leon Smith), at

<http://sports.espn.go.com/nba/players/statistics?statsId=3352&type=avg> (last visited Feb. 1, 2004).

points and 5 rebounds a game.¹²⁵ He has since rejoined the Steelheads, where he was recently named to the CBA All-Star team, and he hopes his continued success in the CBA will translate into another opportunity to play in the NBA.¹²⁶ Classification: Minor Leaguer.

14. Darius Miles: Selected 3rd overall (first round) in the 2000 NBA Draft by the Los Angeles Clippers out of East St. Louis High School (MO), thereby earning a three-year \$8 million contract, which was later extended for a fourth season.¹²⁷ Following a successful rookie campaign when he earned a spot on the All-Rookie team, Miles averaged 10 points and 6 rebounds per game as one of the Clippers' top reserves in the 2001–02 season. In the 2002 off season, Miles was traded, along with Harold Jamison, to the Cleveland Cavaliers in exchange for Andre Miller and Bryant Stith. As a member of the Cavaliers, Miles became the team's starting small forward, averaging 9 points and 6 rebounds a game during the 2002–03 season.¹²⁸ In January 2004, Miles was traded to the Portland Trailblazers in exchange for Jeff McInnis and Ruben Boumtje Boumtje. Overall, Miles has had a respectable 2003–04 season, thus far averaging 9 points and 5 rebounds per game. Classification: Serviceable.
15. DeShawn Stevenson: Selected 23rd overall (first round) in the 2000 NBA Draft by the Utah Jazz out of Washington Union High School (CA), thus securing a three-year contract for \$6 million. Played little during his rookie season, when he appeared in only 40 games, though by his second season, he became a regular, playing 18 minutes a game and averaging 5 points and 2 rebounds. Stevenson, however, has experienced off-the-court legal difficulties, as he was charged with statutory rape for allegedly having sex with a 14-year-old. He pleaded not guilty, and the charges were ultimately dropped for lack of evidence.¹²⁹ Stevenson is off to a fast start in the 2003–

¹²⁵ US Basketball.com, Player Profile (Leon Smith), at <http://www.usbasket.com/USAPlayer.asp?PlayerID=22255> (last visited Oct. 15, 2003); US Basketball.com, Player News (Leon Smith), at <http://www.usbasket.com/usb/usb.asp?NewsNo=37> (last visited Oct. 15, 2003); see also Ryan O'Leary, Leon and On and On, Northwest Indiana Times, Sept. 11, 2003, available at http://nwitimes.com/articles/2003/09/11/sports/pro_sports/2e30f6579299a6d086256d9d007ce5c6.txt.

¹²⁶ *Id.*

¹²⁷ Stoudamire Mum on Possible Charges, Seattle Post-Intelligencer, Apr. 17, 2002, at D4.

¹²⁸ ESPN.com, NBA Player Statistics (Darius Miles), at <http://sports.espn.go.com/nba/players/statistics?statsId=3402> (last visited Feb. 1, 2004).

¹²⁹ Sports in Brief, San Diego Trib., Apr. 20, 2002, at D4; see also Marc J. Spears, Prep stars and college players cut out of class early to take a spin in the NBA, Denv. Post, July 17, 2001, at D01.

04 season, thus far averaging 12 points and 3 rebounds per game. Impressed by his play, the Orlando Magic traded for him in February 2004.¹³⁰ Classification: Serviceable.

16. Kwame Brown: Selected 1st overall (first round) in the 2001 NBA Draft by the Washington Wizards out of Glynn Academy (GA). First high school player to be selected 1st overall. Signed a three-year deal worth \$12 million. Like most high school players in their first NBA season, Brown struggled, playing in only 57 games and averaging 5 points and 4 rebounds per game (incidentally, numbers comparable to McGrady, who averaged only 7 points and 2 rebounds during his first season).¹³¹ Brown showed promise at the end of the season, however, averaging 9 points and 9 rebounds a game over the last three games.¹³² That promise largely continued into the 2002–03 season, as Brown averaged 7 points and 5 rebounds, including starting 20 games.¹³³ Brown is now a member of the Wizards' starting lineup, averaging 10 points and 7 rebounds per game thus far in the 2003–04 season. Classification: Serviceable.
17. Tyson Chandler: Selected 2nd overall (first round) by the Los Angeles Clippers in the 2001 NBA Draft, out of Dominguez High School (CA), then immediately traded to the Chicago Bulls. Signed a three-year deal worth \$11 million. Played reasonably well for the last-place Bulls, as he appeared in 71 games, averaging 20 minutes, six points, and five rebounds per game.¹³⁴ Earned more playing time by the end of his rookie season, averaging 30 minutes per game over his last five games.¹³⁵ During the 2002–03 season, Chandler continued his progression, becoming the Bulls' starting power forward and team leader in block shots, averaging 24 minutes, 9 points, 7 rebounds, and 2 blocks per game.¹³⁶ In the 2003–04

¹³⁰ ESPN.com, NBA Player Statistics (DeShawn Stevenson), at <http://sports.espn.go.com/nba/players/statistics?statsId=3422> (last visited Dec. 10 2003).

¹³¹ ESPN.com, NBA Player Statistics (Kwame Brown), at <http://sports.espn.go.com/nba/players/statistics?statsId=3511> (last visited Feb. 1, 2004).

¹³² ESPN.com, NBA Player Statistics For Last Five Games (Kwame Brown), at <http://sports.espn.go.com/nba/players/profile?statsId=3511> (last visited Feb. 1, 2004).

¹³³ ESPN.com, NBA Player Statistics (Kwame Brown), *supra* note 131.

¹³⁴ ESPN.com, NBA Player Statistics (Tyson Chandler), at <http://sports.espn.go.com/nba/players/profile?statsId=3512> (last visited Feb. 1, 2004).

¹³⁵ ESPN.com, NBA Player Statistics For Last Five Games (Tyson Chandler), at <http://sports.espn.go.com/nba/players/profile?statsId=3512> (last visited Feb. 1, 2004).

¹³⁶ ESPN.com, NBA Player Statistics (Tyson Chandler), *supra* note 134.

season, Chandler has become a bona fide star, thus far averaging 13 points and 10 rebounds per game. Classification: Star.

18. Eddy Curry: Selected 4th overall (first round) by the Chicago Bulls in the 2001 NBA Draft out of Thornwood High School (IL). Signed a three-year deal worth \$9 million. Like his teammate Chandler, Curry played well during his rookie season, as he appeared in 72 games, averaging 16 minutes, 7 points, and 4 rebounds per game.¹³⁷ Also excelled at the end of the season, averaging 27 minutes, 14 points, and 7 rebounds per game over his last four games.¹³⁸ Curry continued to progress during the 2002–03 season, averaging 19 minutes, 11 points, and 4 rebounds per game, and that progression has continued into the 2003–04 season, averaging 29 minutes, 11 points, five rebounds, and 2 blocks per game.¹³⁹ Though his overall statistics are not exemplary, his play has already attracted the praise of arguably the NBA's best player, Shaquille O'Neal, who, in March 2003, called Curry one of the top three centers in the NBA, as well as noting, "He's only 20 years old [and] he has plenty of time to claim the 'best center' title."¹⁴⁰ His progression has continued in the 2003–04 season, and thus far he averages 12 points and 6 rebounds a game. Classification: Serviceable.
19. DeSagana Diop: Selected 8th overall (first round) by the Cleveland Cavaliers in the 2001 NBA Draft out of Oak Hill Academy (VA). Signed a three-year deal worth \$5 million. Was injured early in the season, and struggled badly when he played, appearing in only 18 games, and averaging a meager 1 point and 1 rebound per game.¹⁴¹ His struggles continued into the 2002–03 season, when he averaged only 2 points and 3 rebounds per game, although he has progressed slightly in the 2003–04 season, thus far averaging 3 points and 4 rebounds per game—enough progress to convince the Cavaliers to recently exercise his 2004–05 option for \$2.7 million.¹⁴² Classification: Fringe.

¹³⁷ ESPN.com, NBA Player Statistics (Eddy Curry), at

<http://sports.espn.go.com/nba/players/profile?statsId=3514> (last visited Feb. 1, 2004).

¹³⁸ ESPN.com, NBA Player Statistics For Last Five Games (Eddy Curry), at

<http://sports.espn.go.com/nba/players/profile?statsId=3514> (last visited Feb. 1, 2004).

¹³⁹ ESPN.com, NBA Player Statistics (Eddy Curry), *supra* note 137.

¹⁴⁰ Rick Telander, *Shaq Likes What He Sees in Curry*, Chicago Sun-Times, Mar. 12, 2003, available at

<http://www.suntimes.com/output/telander/cst-spt-rick121.html>.

¹⁴¹ ESPN.com, NBA Player Statistics (DeSagana Diop), at

<http://sports.espn.go.com/nba/players/profile?statsId=3518> (last visited Feb. 1, 2004).

¹⁴² *Id.*

20. Ousmane Cisse: Selected 47th overall (second round) in the 2001 NBA Draft by the Denver Nuggets out of St. Jude High School (AL). After signing him to a one-year deal for the NBA minimum, he battled knee problems, and failed a team physical on October 1, 2002, which allowed the Nuggets to void his contract. He then played basketball daily in Montgomery, Alabama, with the aspiration of signing with a NBA team.¹⁴³ No NBA team signed him, however, though he appeared on the Philadelphia 76ers 2002 summer league team in the Shaw's Pro Summer League. The 76ers choose not to sign him, but he then signed with Lokomotiv Mineralnye Vody, a team in the Russian A Superleague. He played in Russia until December 2002, when he signed with the Harlem Globetrotters, and remained with the Globetrotters for the remainder of their exhibition season.¹⁴⁴ During the spring of 2003, Cisse played for the Adirondack Wildcats and the Brevard Blue Ducks of the USBL, leading the USBL in blocked shots per game, and earning a spot on the USBL All-Rookie team.¹⁴⁵ His success in the USBL temporarily earned him a spot on the Orlando Magic's recent training camp roster—thus taking him one step closer to his NBA dream—but he was waived prior to the start of the 2003–04 season. He now plays for the Nike All-Star team, a barnstorming exhibition team which, in a twist of irony, plays Division I college basketball teams.¹⁴⁶ Classification: Minor Leaguer.
21. Tony Key: Not drafted by an NBA team in the 2001 NBA Draft out of Centennial High School (CA). Because he declared for the NBA Draft, he forfeited the right to play Division I college basketball. Instead, he went to Los Angeles City College, a junior college, where he earned a spot on the team's basketball team (the Cubs) and averaged 15 points and 8 rebounds per game during the 2001–02 season. He also led the Cubs to the state's finals for junior college basketball, though was suspended twice during the

¹⁴³ Marc J. Spears, Draft Pick Cisse Likely Won't Play for Nugs, *Denv. Post*, Nov. 13, 2001, at D05.

¹⁴⁴ US Basketball.com, Player Profile (Ousmane Cisse), at <http://www.usbasket.com/USAplayer.asp?PlayerID=3437> (last visited Feb. 1, 2004).

¹⁴⁵ Hoopshype.com, Player Profile (Ousmane Cisse), at http://www.hoopshype.com/players/ousmane_cisse.htm (last visited Feb. 1, 2004).

¹⁴⁶ Jorge Sierra, Ousmane Cisse: I Know I Belong in the NBA, *Hoopshype.com*, Sept. 16, 2003, available at http://www.hoopshype.com/interviews/cisse_sierra.htm; see also ESPN.com, NBA Team Transactions (Orlando Magic), at <http://sports.espn.go.com/nba/teams/transactions?team=orl> (last visited Feb. 1, 2004); Kevin Brockway, Gators Hope to Get Grip, *Gainesville Sun*, available at <http://www.gatorsports.com/apps/pbcs.dll/article?AID=/20031118/GATORS02/211180317/1011/GATORS>.

season for misbehavior.¹⁴⁷ He then red-shirted during the 2002–03 season, and in the summer of 2002 played with the Fitness World Bad Boyz Team in the Independence Pro-Am summer league in Owensboro, Kentucky.¹⁴⁸ Key has since returned to active roster of the Cubs, where he is the team's starting center.¹⁴⁹ He remains intent on pursuing a professional basketball career.¹⁵⁰ Classification: Bust.

22. Amare Stoudemire: Selected 9th overall (first round) by the Phoenix Suns in the 2002 NBA Draft out of Cypress Creek High School (FL). Stoudemire had *perhaps the greatest impact ever of any high school player during his rookie season*, as he immediately became the Suns' starting power forward, averaging 31 minutes, 14 points and 9 rebounds per game.¹⁵¹ For his spectacular rookie season, Stoudemire was named the NBA's Rookie of the Year.¹⁵² His success has only continued into the 2003–04 season, as he is currently averaging 34 minutes, 16 points, and 8 rebounds per game. Suns senior executive vice president Cotton Fitzsimmons has even hailed Stoudemire as, "the best player the Phoenix Suns have ever drafted," and Minnesota Timberwolves coach Flip Saunders compares him to a young Karl Malone.¹⁵³ Teammate Stephon Marbury offers a similarly glowing report: "Amare's a stud. Next year, he'll probably be an All-Star. I didn't think it would happen this fast, but I knew he would be a dominant player. He's more mature than other (rookies). He's way beyond (more) physically fit than the younger guys."¹⁵⁴

¹⁴⁷ According to Michael Miller, head coach of the Los Angeles City College men's basketball team, "with [Key's] size and with his hands, you'd think a guy like that should dominate at this level. He has done some good things for us, but he hasn't done that. He hasn't dominated. He's got some rough edges." Peter May, *Pro Basketball Notes*, Boston Globe, Dec. 23, 2001, at C6.

¹⁴⁸ US Basketball.com, Player Profile (Tony Key), at <http://www.usbasket.com/USAplayer.asp?PlayerID=49035> (last visited Feb. 1, 2004).

¹⁴⁹ Los Angeles City College Homepage, Team Forecast, at <http://gocubs.lacitycollege.edu/basketball/men/20032004forecast.html> (last visited Feb. 1, 2004).

¹⁵⁰ US Basketball.com, Player Profile (Tony Key), *supra* note 148.

¹⁵¹ ESPN.com, NBA Player Statistics (Amare Stoudemire), at <http://sports.espn.go.com/nba/players/statistics?statsId=3607> (last visited Feb. 1, 2004).

¹⁵² Bob Baum, Amare Stoudemire of Phoenix Suns Wins NBA Rookie of the Year Award, at Yahoo Sports, <http://ca.sports.yahoo.com/030424/6/stzm.html> (Apr. 24, 2003).

¹⁵³ Mike Kahn, Suns rookie Stoudemire quietly arriving among league's elite, CBS Sportsline, at <http://cbs.sportsline.com/nba/story/6174538> (Feb. 7, 2003).

¹⁵⁴ *Id.*

23. DeAngelo Collins: Not drafted by a NBA team in the 2002 NBA Draft out of Inglewood High School (CA). Received a tryout from the Toronto Raptors, but was not signed. He was selected 38th overall (fifth round) in the 2002 Continental Basketball Association Draft by the Sioux Falls Skyforce. Instead of joining the Continental Basketball Association, Collins signed with Darussafaka Istanbul, a team in the Turkish Basketball Association. After signing, however, his contract was cancelled in December of 2002.¹⁵⁵ Collins eventually reached a financial settlement with Darussafaka, and spent most of 2003 recuperating from a knee injury. He played in the Los Angeles Summer League, and the Cleveland Cavaliers contemplated inviting Collins to their training camp, but ultimately passed due to concerns about his knee.¹⁵⁶
24. Lenny Cooke: Not drafted by an NBA team in the 2002 NBA Draft out of Mott Adult High School (Flint, MI). Opted not to take advantage of April 2002 modifications, and instead signed with an agent, thus precluding an opportunity to play Division I college basketball. Following the 2002 NBA Draft, Cooke signed with the Seattle Supersonics as a rookie free agent, but, primarily due to an injury, was released shortly thereafter. He then played briefly for the Columbus Riverdragons of the National Basketball Development League,¹⁵⁷ followed by signing with the Brooklyn Kings of the USBL. Cooke played phenomenally well in the USBL, leading the league in scoring, steals, offensive rebounds, and winning the league's Rookie of the Year award.¹⁵⁸ He also impressed NBA scouts, and the Boston Celtics signed him to its summer league team. Unfortunately for Cooke, he received sparse playing time from the Celtics' coaching staff, and was not invited to the team's training camp.¹⁵⁹ Cooke now plays in the

¹⁵⁵ US Basketball.com, Player Profile (DeAngelo Collins), at

<http://www.usbasket.com/USAPlayer.asp?PlayerID=49230> (last visited Feb. 1, 2004).

¹⁵⁶ Dan Wetzel, ACC Expansion to 13 Wouldn't Add Up for Anybody, CBS Sportsline.com, June 19, 2003, at <http://www.cbs.sportsline.com/collegebasketball/story/6438747>.

¹⁵⁷ For a comprehensive account of Cooke, see Tom Farrey, For Lenny Cooke, Its All Academic, ESPN.com, May 10, 2003, at

<http://espn.go.com/ncb/s/2002/0301/1343347.html>.

¹⁵⁸ Michael O'Keefe, Cooke Rematch Made to Order, New York Daily News, July 14, 2003, available at <http://www.nydailynews.com/sports/story/100521p-90893c.html>; see also Boston Celtics Summer League Media Guide, available at <http://www.nba.com/media/celtics/SummerLeagueMediaGuide0721.pdf> (last visited Feb. 1, 2004); USBL 2003 Statistical Report, available at <http://www.usbl.com/2003StatGuide.pdf> (last visited Feb. 1, 2004).

¹⁵⁹ Al Iannazzone, Cooke Does a Slow Burn, North Jersey Media Group, July 22, 2003, available at <http://www.northjersey.com/page>.

Philippine Basketball Association, where in his debut game for the Purefoods Hotdogs team, he scored 49 points and grabbed 17 rebounds.¹⁶⁰

25. LeBron James: Selected 1st overall (first round) by the Cleveland Cavaliers in the 2003 NBA Draft out of St. Mary/St. Vincent High School (Akron, Ohio). Less than one month after graduating from high school, James secured endorsement contracts worth, in total, over \$110 million. Specifically, he signed a seven-year shoe contract with Nike for \$90 million, a seven-year promotional contract with Coca-Cola for \$15 million, and a five-year trading cards contract with Upper Deck for \$6 million.¹⁶¹ Per the rookie salary cap, he then signed a three-year contract with the Cavaliers for \$13 million. Played for the Cavaliers' summer league team, averaging 16 points, 7 rebounds, and 4 assists.¹⁶² Arguably the most heralded rookie in the history of the NBA, and he has helped expand the NBA's fan base. Indeed, in his debut game on October 28, 2003, 2.49 million households nationwide watched the game on ESPN—a rating higher than all but one of ESPN's 69 regular season games in the 2002–03 season.¹⁶³ James has had a similar effect on local television ratings for Cavaliers' games, with ratings nearly 200% higher this season than during the 2002–03 season—prompting an executive of Fox Sports Net Ohio to remark: “The dramatic jump in our ratings is just another example of the tremendous impact LeBron's had in this market.”¹⁶⁴ Equally remarkable, James already leads the Cavaliers in points, assists, and steals per game (20 points, 6 assists, 2 steals, respectively), and he leads all NBA rookies in points and assists per game as well. His early success has even prompted Cavaliers general manager John Paxson to compare him to a Larry Bird/Magic Johnson hybrid.¹⁶⁵ He also

¹⁶⁰ June Navarro, FedEx Bucks 49 Point Job by Purefoods Import, *IMQ7.Net*, Oct. 4, 2003, at http://www.inq7.net/spo/2003/oct/04/spo_1-1.htm (last visited Feb. 1, 2004).

¹⁶¹ LeBron James hits Jackpot with Endorsement Deals, *USA Today*, May 22, 2003, available at http://www.usatoday.com/sports/basketball/draft/2003-05-22-james-deals_x.htm; see also Brian Windhorst, James Signs Reported \$15 million deal with Coca-Cola, *Akron Beacon Journal*, Aug. 21, 2003, available at <http://www.philly.com/mld/philly/sports/basketball/nba/6588764.htm>.

¹⁶² LeBron James Struggles in Final Boston Summer League Game, *USA Today*, July 21, 2003, available at http://www.usatoday.com/sports/basketball/nba/cavaliers/2003-07-20-james-summer_x.htm.

¹⁶³ LeBron James Struggles in Final Boston Summer League Game, *USA Today*, July 21, 2003, available at http://www.usatoday.com/sports/basketball/nba/cavaliers/2003-07-20-james-summer_x.htm.

¹⁶⁴ Bob Finnan, LeBron Making Cavs Must-See TV, *Morning J.*, Dec. 6, 2003, available at http://www.morningjournal.com/site/news.cfm?BRD=1699&dept_id=46370&newsid=10623919&PA G=461&rft=9 (quoting Steve Liverani).

¹⁶⁵ Tom Withers, LeBron Scores 8 in Debut, *A. P.*, Oct. 8, 2003, available at

has wowed opponents, such as Vlade Divac of the Sacramento Kings, who after watching James record 25 points and 9 assists in his NBA debut, remarked simply, "He's the real deal."¹⁶⁶

26. Travis Outlaw: Selected 23rd overall (first round) by the Portland Trailblazers in the 2003 NBA Draft out of Starkville High School (Starkville, Mississippi). Signed a three-year contract with the Trailblazers for \$3 million. Struggled for the Trailblazers' summer league team, averaging only 4 points and 2 rebounds per game, but is now on the Trailblazers' active roster.¹⁶⁷
27. Ndudi Ebbe: Selected 26th overall (first round) by the Minnesota Timberwolves in the 2003 NBA Draft out of Westbury Christian High School (Houston, Texas). Signed a three-year contract with the Timberwolves for \$2 million. Played for the Timberwolves' summer league team, averaging 8 points per game, and is now on the Timberwolves' active roster.¹⁶⁸
28. Kendrick Perkins: Selected 27th overall (first round) by the Boston Celtics in the 2003 NBA Draft out of Clifton J. Ozon High School (Beaumont, Texas). Signed a three-year contract with the Celtics for \$2 million. Though a foot injury prevented him from playing in the Celtics' summer league team, his early play in training camp has marveled Celtics executives. For instance, former Celtics' head coach Jim O'Brien recently raved, "'I think [Perkins] is going to come along very quickly. He's a quick learner. He wants to be better every day. He's been our best rebounder in training camp, and I think he's got a great future ahead of him.'" Perkins is now on the Celtics' active roster.¹⁶⁹
29. James Lang: Selected 48th overall (second round) by the New Orleans Hornets in the 2003 NBA Draft out of Central Park Christian School

<http://www.montereyherald.com/mld/montereyherald/sports/basketball/6957106.htm>.

¹⁶⁶ Dazzling Debut, Associated Press, Oct. 30, 2003, available at

<http://sportsillustrated.cnn.com/2003/basketball/nba/10/30/cavs.kings.ap/>.

¹⁶⁷ Chad Ford, Rookies Find Their Summer Grove, NBA Insider, ESPN.com, July 28, 2003.

¹⁶⁸ Pohlad Won't Add to Payroll, Minnesota Star Trib., Sept. 5, 2003, available at

<http://www.startribune.com/stories/507/3985111.html>.

¹⁶⁹ Celtics Offseason Movement, Celtics.com, available at

http://www.nba.com/celtics/news/Celtics_Offseason_Movement.html (last updated July 29, 2003); Carolyn Thomson, Celts Can't Finish The Way They Start, Providence J., Oct. 9, 2003, available at

http://www.projo.com/celtics/content/projo_20031009_09celts.78905.html.

(Birmingham, Alabama). Signed a non-guaranteed, two-year contract with the Hornets for \$931,000. Made the team out of training camp, but was waived on December 30, 2003 (earning over \$150,000). Hopes to catch on with another NBA team; will play in the NBDL in the interim.¹⁷⁰

It is interesting to observe comments made by respected NBA coaches and analysts concerning high school players who declare for the NBA Draft. For instance, Dick Vitale, famed college basketball coach and analyst, remarks, "For every Kobe, there is a Leon Smith and a Korleone Young."¹⁷¹ Similarly, Bob Wojnowski, a columnist for the *Detroit News*, comments, "For every Kobe, there are way too many Korleones."¹⁷² Likewise, Phil Jackson, head coach of the Los Angeles Lakers, notes, "I've had this argument with Kobe and he talks about how many great players have come into the NBA from high school in the last four or five years. Yet innumerable players have not been able to marshal the talent of a Garnett or a McGrady and have not made it."¹⁷³ Perhaps most dramatically, Steve Lavin, former head coach of the UCLA Bruins, hopes "there will be fewer tragic or sad episodes involving young people and their decision-making regarding the rest of their life."¹⁷⁴

As a group, however, the 29 high school players who declared for the NBA Draft have done abnormally *well*. Their success can be measured in several ways.

1. Draft Position Success

First, observe their ability to persuade NBA teams to draft them: 66% were drafted in the first round, 17% were drafted in the second round, and 17% were not drafted at all; more simply, 83% of high school players who have entered the NBA Draft have been drafted. In stark contrast, of the 121 college underclassmen who declared their eligibility and participated in the Draft from 2001 to 2003, only 31% were drafted in the first round, 15% were drafted in the second round, and 54% were not drafted at all.¹⁷⁵ As a further point of contrast,

¹⁷⁰ No terms of Lang's contract were disclosed, but this is its minimum amount (since a minimum two-year contract for a 2003-04 rookie would pay him \$367,000 in his first season and \$564,000 in his second season). See Kaneshiro, *supra* note 41.

¹⁷¹ Dick Vitale, *Early Entry?* For every Kobe, there's a Leon Smith, ESPN.com, May 16, 2001, at <http://espn.go.com/dickvitale/vcolumn010516earlyentries.html>.

¹⁷² Bob Wojnowski, *NBA Can Trap the Young*, *Det. News*, May 17, 2001, at 20.

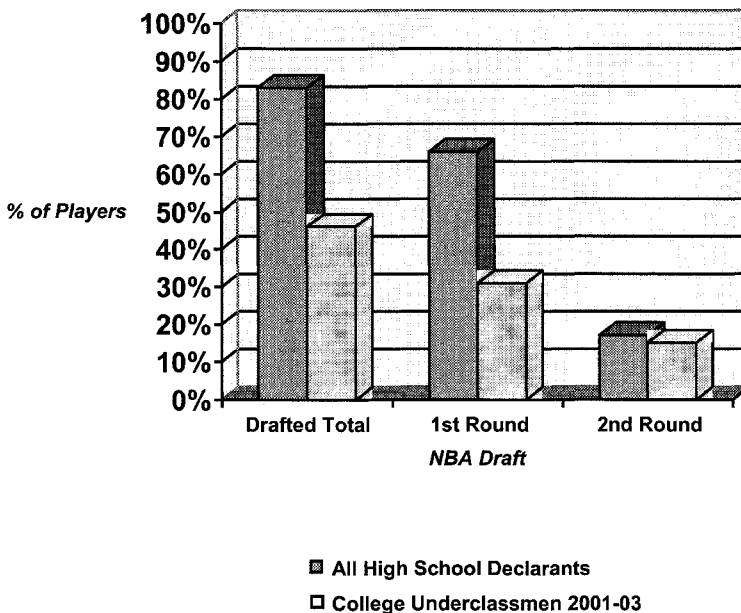
¹⁷³ *Id.*

¹⁷⁴ Schain, *supra* note 76.

¹⁷⁵ Final List of Underclassmen and Foreign Players for 2003 NBA Draft, available at <http://www.dfw.net/~patricia/nba-daily/older/02-03/scores6-20.txt> (last visited Feb. 1, 2004); see also

of the 157 college underclassmen who entered the NBA Draft from 1992 to 1998, only 42% of them were drafted, and most of them were taken in the second round.¹⁷⁶ Consequently, high school players have succeeded in the NBA Draft at a rate significantly better than has any other age cohort.

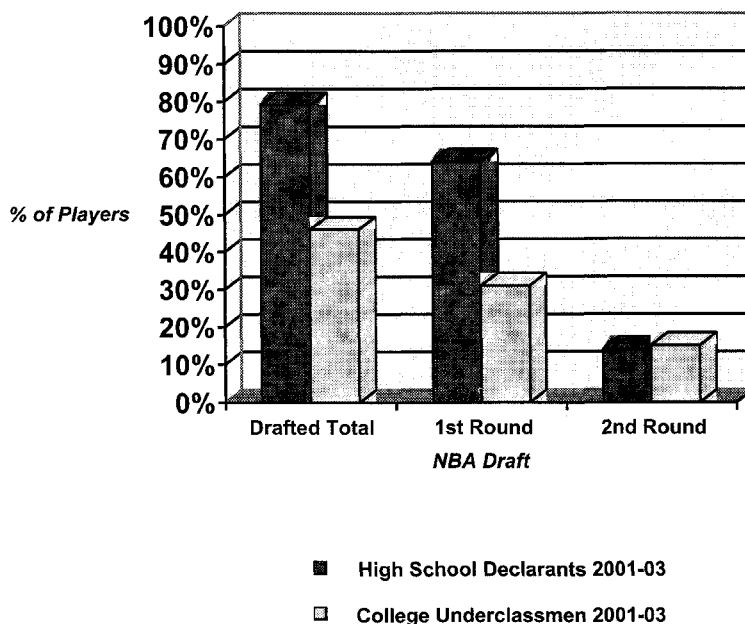
TABLE 8: DRAFT POSITION SUCCESS OF ALL HIGH SCHOOL DECLARANTS V. COLLEGE UNDERCLASSMEN DECLARANTS 2001-03



How the Underclassmen Fared, USA Today, June 27, 2002, available at <http://www.usatoday.com/sports/nba/02draft/underclassmen.htm> (last visited Feb. 1, 2004) (for 2002 NBA Draft); Bob Condotta, UW One of Few Teams Not Hurt by New 5-and-8 Rule, News Trib. (Tacoma, WA), June 1, 2001, at 24 (The author cites 58 underclassmen, but he includes the six highschool players as well as four college players (Sam Clancy, Jarron Collins, Reo Logan, and Jason Gardner) who withdrew prior to the Draft.). Michael DiRocco, Gators lose top recruit to NBA Family concerns sway Brown, Fla. Times Union, May 13, 2001, at C1. For actual NBA draft results, see NBADraft.com, 2001 Draft, at <http://www.nbadraft.net/2001.htm> (last visited Feb. 1, 2004).

¹⁷⁶ Ethan J. Skolnick, Ready or Not, Here they Come, Palm Beach Post, June 27, 1999, at 14C.

TABLE 9: DRAFT POSITION SUCCESS OF HIGH SCHOOL DECLARANTS 2001-03 V. COLLEGE UNDERCLASSMEN DECLARANTS 2001-03



A plausible explanation for the high school players' unusually successful draft rate may derive at least partly from the previously discussed penalty schemes imposed by the NCAA.¹⁷⁷ In brief, until April 2002, high school players who declared immediately forfeited their collegiate eligibility, whereas college underclassmen, provided they had not signed with agents, could declare and later reverse their decision without penalty.¹⁷⁸ Considering the unusually high success rate of high school players who have entered the NBA Draft, the rule appears to have successfully discouraged from declaring those high school players who were better off playing college basketball. Moreover, given the previously discussed limitations of the April 2002 modifications, high school players should remain weary of participating in the NBA Draft unless they are confident they will be among the first group of players selected. In a sense,

¹⁷⁷ See *supra*.

¹⁷⁸ Mike Finger, NBA Head-Start Program Growing, San Antonio Express-News, May 13, 2001, Sports, at 1.

therefore, high school players have done so well in the NBA Draft because they knew they would do so well; otherwise they would not have declared. The most recent NBA Draft only amplifies this point, as all five of the high school players who signed with agents for the 2003 NBA Draft were drafted – four in the first round – thus suggesting that the April 2002 modifications will only strengthen the exceptional draft record of high school entrants.

2. Financial Success

High school players' financial gains also demonstrate their general success. In making this evaluation, we will set aside the earnings of both Daryl Dawkins and Bill Willoughby, since both players retired years ago (and retired as millionaires). Contextually, keep in mind that high school players who declare for the NBA Draft typically come from very poor families, and multimillion dollar NBA contracts would dramatically improve their lives, as well as the lives of their family members.¹⁷⁹

The following table displays the 2001–02, 2002–03, and 2003–04 professional basketball salaries of the individual high school players.¹⁸⁰ We then

¹⁷⁹ Michael Wilbon, *Stern Wants Age Limit*, Wash. Post, June 14, 1999, at D1. Kwame Brown, for example, was the youngest of eight children from a poor family. Greg Wallace, *NBA Drain a Pain*, Chattanooga Times, Dec. 13, 2001, at D1. Likewise, Leon Smith was in part motivated to declare for the NBA Draft because of his family's poverty. Vahe Gregorian, *A Leap of Faith?*, St. Louis Post-Dispatch, June 25, 2000, at D1.

¹⁸⁰ Please note the following when reading the Chart:

Age for the 2001–02 season is calculated as of April 24, 2002; for the 2002–02 season, as of April 24, 2003; for the 2003–04 season, as of April 24, 2003. Unless noted below, salaries are provided by the following two sources: (1) Basketballworld.com; (2) Hoopsworld.com; and USA Today. Rashard Lewis was a second round pick, meaning he was not bound by the rookie wage scale, and was thus able to negotiate an "opt-out" for the 2002 off-season. Leon Smith had three sources of basketball income for the 2001–02 season: \$150,000 a year as settlement with the Mavericks, a pro-rated amount of a likely \$30,000–\$40,000 salary while playing in the Continental Basketball Association; and a prorated amount of his salary with the Hawks. Since he was only on the Hawks' roster for roughly the last third of the season, he probably earned a third of the NBA minimum for the 2001–02 season (*i.e.*, .33 x \$312,187). Ousmane Cisse was on Denver's payroll for approximately three months before his contract was voided after failing a physical. Because he was a second round pick, we will assume he signed for the 2001–02 NBA minimum of \$312,187, and that he earned three months—or 25%—of that amount. The fact that he was drafted, albeit in the second round, suggests that he, like Korleone Young, should be able to earn an income playing basketball. Korleone Young's salaries are conservative estimates of how much Young earned by playing basketball in the National Basketball League, Australia's top professional league. Teams in this league are allowed to spend a total of \$1.05 million for a roster of 14 players. Chris Wilson, *Cannons Concede "Money Man"* just too Expensive, Canberra Times, Apr. 19, 2002, at A30. Therefore, a \$75,000 contract would absorb less than 10% of the team's payroll. In 2002–03 and 2003–04, Young earns a higher income in Russia. The "Average High School Player" refers to the average professional basketball salaries of the high

aggregate both the average and the median of the 27 high school players' professional basketball salaries, then we do the same for the salaries of the high school players actually playing in the NBA, and then finally for the salaries of all NBA players:

school players eligible to play in the NBA for each season (e.g., LeBron James was not eligible to play in the NBA until the 2003–04 season, so he will not count towards the salary figures for 2001–02 or 2002–03). The calculation simply derives from an average of the player salaries listed on the chart, provided they are eligible.

The "Median High School Player" refers to the median professional basketball salary of the high school players eligible to play in the NBA each season. For both seasons, Eddy Curry's salary reflects the median salary, since it is the salary where half the remaining high school players' salaries are higher and half are lower.

The "Average NBA H.S. Player" refers to the average salary of those high school players actually playing in the NBA each season (*i.e.*, we remove the salaries of the five players not playing in the NBA (McDavid, Young, Richardson, Cisse, and Key).

The "Median NBA H.S. Player" refers to the median salary of those high school players playing in the NBA. For the 2001–02 season, we use the average of Kwame Brown's and Tyson Chandler's salaries to locate the salary where half the remaining salaries of the high school players presently playing in the NBA are higher and half are lower. For the 2002–03 season, when Al Harrington's salary jumps from \$1,437,000 to \$5,000,000 (thereby becoming the sixth highest salary), we use the average of Kwame Brown's and Tyson Chandler's salaries to locate the salary where half the remaining salaries of the high school players presently playing in the NBA are higher and half are lower.

The "Average NBA Player" refers to the average salary of all players in the NBA. For the 2004–05 season, we project an earnings figure that assumes a rate of annual salary increase of 8.26%, which represents the average annual rate of increase between the 1999–2000 and the 2003–2004 seasons (16.67% increase from the 1999–2000 season to the 2000–2001 season (\$3.6 million to \$4.2 million); 7.15% increase from 2000–2001 to 2001–2002 (\$4.2 million to \$4.5 million); 1.0% increase between 2001–2002 to 2002–2003 (\$4.5 million to \$4.546 million); and a 8.2% increase from 2002–2003 (\$4.546 million to \$4.917 million). For 2002–03 average salary, see Chris Sheridan, *Among Lessons for NBA Rookies: Relationships Can Be Hard to Figure*, Sept. 24, 2003, <http://slam.canoe.ca/Slam/Basketball/NBA/2003/09/24/201674-ap.html>; see also *NBA Salary Cap and Average Salary Progression*, Sports Ticker, July 15, 2003, available at http://quickstart.clari.net/qs_sc/webnews/wed/ce/Sbkp-Igns-salarycapchart.R3fk_DIF.html.

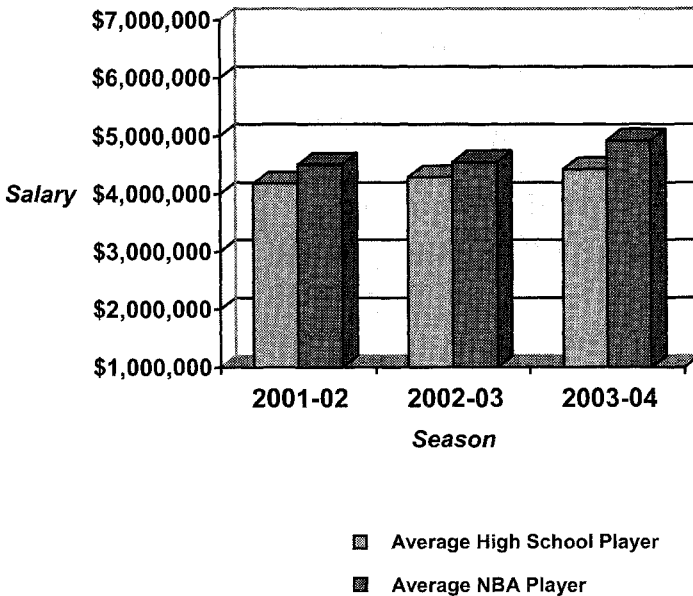
The "Median NBA Player" refers to the median salary of all players in the NBA. For the 2001–02 season, this number was determined by using the list of 416 salaries provided by Basketball.com. Hubert Davis' salary serves as the 208th highest salary, or the median salary, whereby half the remaining salaries are higher and half are lower. Basketball.com, *Player Salaries*, at <http://www.bskball.com/0102Salarydatasheet.shtml> (last visited Feb. 1, 2004). For the 2002–03 and 2003–04 season, we will increase the median salary by 15.39% (*i.e.*, the same rate of increase used for calculating the 2002–03 average NBA salary); 2002–2003 NBA Player Salaries, *Hoopsworld*, Aug. 20, 2003, available at http://www.hoopsworld.com/article_3473.shtml (2002–03 season).

TABLE 10: PRO BASKETBALL EARNINGS OF HIGH SCHOOL PLAYERS

PLAYER (BY 03-04 SALARY)	AGE 2002	BASKETBALL SALARY IN 2001-02	AGE 2003	BASKETBALL SALARY IN 2002-03	AGE 2004	BASKETBALL SALARY IN 2003-04
Kevin Garnett	25	\$22,400,000	26	\$25,200,000	27	\$28,000,000
Kobe Bryant	23	\$11,250,000	24	\$12,375,000	25	\$13,500,000
Jermaine O'Neal	23	\$6,325,000	24	\$6,900,000	25	\$13,500,000
Tracy McGrady	22	\$10,865,000	23	\$12,072,500	24	\$13,279,750
Rashard Lewis	22	\$4,413,000	23	\$6,163,744	24	\$7,012,000
Al Harrington	22	\$1,437,000	23	\$5,000,000	24	\$5,690,000
Jonathan Bender	21	\$2,546,000	22	\$3,226,000	23	\$5,680,000
Kwame Brown	20	\$3,697,000	21	\$3,974,760	22	\$4,252,080
Darius Miles	20	\$3,054,840	21	\$3,267,960	22	\$4,130,701
LeBron James	16	NA (high school)	17	NA (high school)	18	\$4,018,920
Tyson Chandler	19	\$3,308,000	20	\$3,556,000	21	\$3,804,360
Eddy Curry	19	\$2,678,000	20	\$2,879,000	21	\$3,080,160
DeSagana Diop	20	\$1,842,000	21	\$1,980,600	22	\$2,118,840
Amare Stoudemire	17	NA (high school)	18	\$1,767,120	19	\$1,899,720
DeShawn Stevenson	21	\$890,000	22	\$956,996	23	\$1,624,022
Travis Outlaw	16	NA (high school)	17	NA (high school)	18	\$941,040
Ndudi Ebbi	16	NA (high school)	17	NA (high school)	18	\$838,560
Kendrick Perkins	16	NA (high school)	17	NA (high school)	18	\$814,320
James Lang	17	NA (high school)	18	NA (high school)	19	\$442,800
Leon Smith	21	\$350,000	22	\$512,435	23	\$200,000
Korleone Young	22	\$75,000	23	\$100,000	24	\$100,000
Lenny Cooke	19	NA (high school)	20	\$30,000	21	\$100,000
Ousmane Cisse	19	\$78,046	20	\$35,000	21	\$100,000
DeAngelo Collins	17	NA (high school)	18	\$50,000	19	\$50,000
Taj McDavid	23	\$0	24	\$0	25	\$0
Ellis Richardson	22	\$0	23	\$0	24	\$0
Tony Key	19	NA (junior college)	20	NA (j. c.)	21	NA (j. c.)
Average High School Player	21	\$4,178,271	22	\$4,288,672		\$4,429,895
Median High School Player	21	\$2,678,000	22	\$3,052,500		\$2,118,840
Average NBA High School Player	21	\$5,358,270	22	\$5,988,808		\$6,061,962
Median NBA High School Player	21	\$3,502,500	22	\$3,765,380		\$4,062,965
Average NBA Player	28	\$4,500,000	28	\$4,546,000		\$4,917,100
Median NBA Player	28	\$2,368,421	28	\$2,368,200		\$2,458,500

This data is revelatory for several reasons. First, as demonstrated in Table 11 below, if we compare the average professional basketball earnings of all high school players versus the average NBA salary over the three seasons, we observe that the high school players' average closely approximates the average NBA salary (\$4,178,271 to \$4,500,000 in 2001-02; \$4,288,672 to \$4,546,000 in 2002-03; and \$4,429,895 to \$4,917,100 in 2003-04), even though these groups are separated by an average of six years in age.

TABLE 11: AVG. PRO BASKETBALL EARNINGS (ALL HIGH SCHOOL PLAYERS)

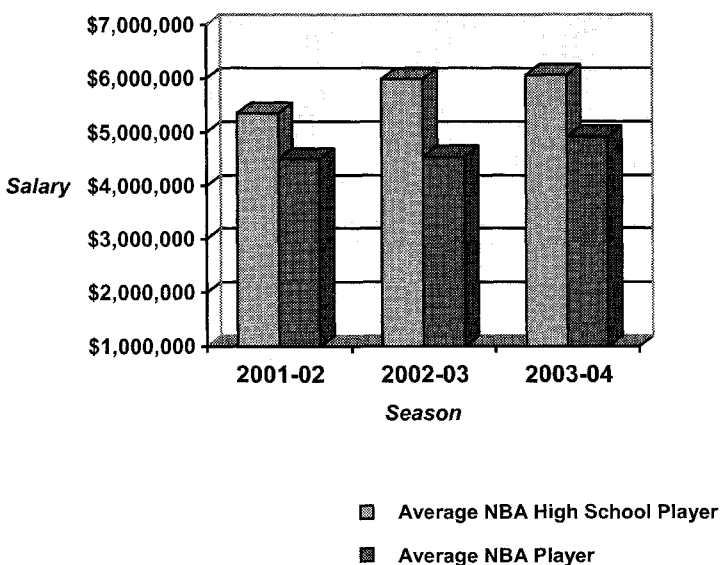


Group	Basketball Salary in 01-02	% of 01-02 Avg. NBA Salary	Basketball Salary in 02-03	% of 02-03 Avg. NBA Salary	Basketball Salary in 03-04	% of 03-04 Avg. NBA Salary
Avg. High School Player	\$4,178,271	92.2%	\$4,288,672	94.3%	\$4,429,895	90.0%
Avg. NBA Player	\$4,500,000	100.0%	\$4,546,000	100.0%	\$4,917,000	100.0%

The high school players' average, however, includes the meager or even non-existent salaries of those high school players who did make or have not made the NBA. As detailed in Table 12, a more realistic comparison would exclude those players from the list, since the average NBA salary obviously does

not include the salaries of those college draft picks (or foreign players) who did not make the NBA. As a result, when using the average of those high school players *playing* in the NBA, the average salary for high school players significantly exceeds the average NBA salary (\$5,358,270 to \$4,500,000 in 2001-02; \$5,988,808 to \$4,546,000 in 2002-03; and \$6,061,962 to \$4,917,000 in 2003-04).

TABLE 12: AVG. PRO BASKETBALL EARNINGS (NBA HIGH SCHOOL PLAYERS)

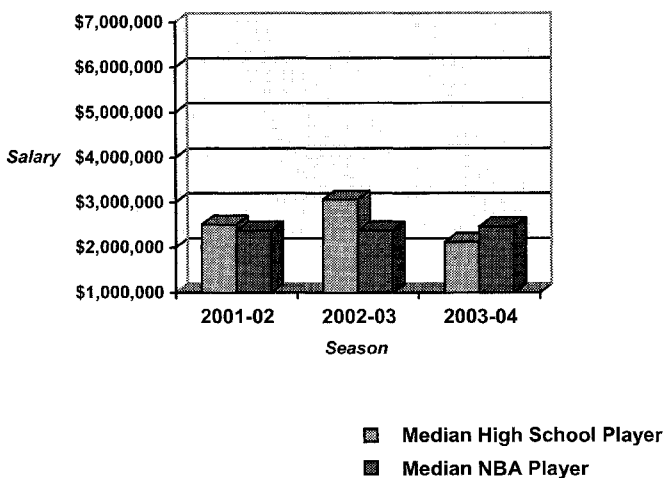


Group	Basketball Salary in 01-02	% of 01-02 Avg. NBA Salary	Basketball Salary in 02-03	% of 02-03 Avg. NBA Salary	Basketball Salary in 03-04	% of 03-04 Avg. NBA Salary
Avg. NBA High School Player	\$5,358,270	119.1%	\$5,988,808	131.7%	\$6,061,962	123.3%
Avg. NBA Player	\$4,500,000	100.0%	\$4,546,000	100.0%	\$4,917,000	100.0%

Comparing median salaries also is illuminating, particularly since the median salary indicates the salary figure where half of the remaining salaries are higher and half are lower. As a result, the median salary minimizes the impact of extreme salaries, and may better reflect the true “middle” salary. By comparing

the median salary of all high school players versus the median NBA salary, we observe that the median high school salary significantly exceeds the median NBA salary in two out of three seasons analyzed. With regard to the 2003–04 season, when the median NBA player salary exceeds the median high school player salary by \$339,660, the influx of five new high school players into the NBA – three of whom earn the relatively low first year salaries associated with late first round pick contracts – deflates the median high school player salary. Paradoxically, this deflation reflects a positive trend for high school declarants: All five of the high school players who both declared for the 2003 NBA Draft and signed financial agreements with agents were drafted.

TABLE 13: MEDIAN PRO BASKETBALL EARNINGS (ALL HIGH SCHOOL PLAYERS)

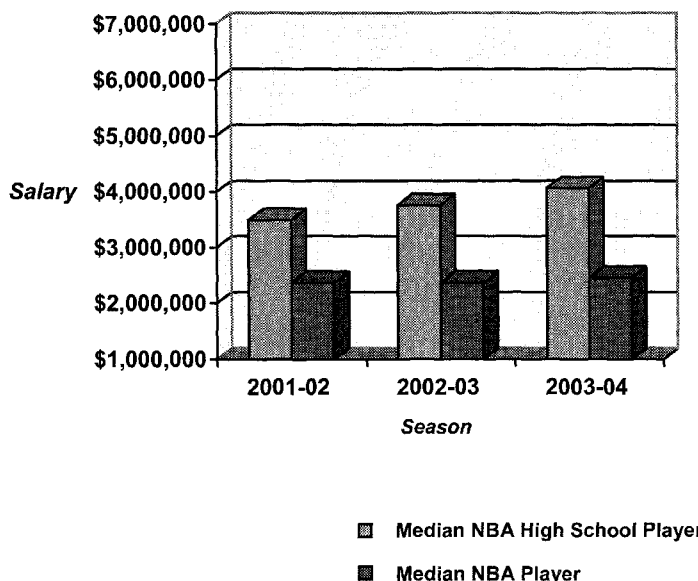


Group	Basketball Salary in 01-02	% of 01-02 Median NBA Salary	Basketball Salary in 02-03	% of 02-03 Median NBA Salary	Basketball Salary in 03-04	% of 03-04 Median NBA Salary
Median High School Player	\$2,502,270	113.1%	\$3,052,500	128.9%	\$2,118,840	86.2%
Median NBA Player	\$2,368,421	100.0%	\$2,368,200	100.0%	\$2,458,500	100.0%

We may also compare the median salaries of the high school players *playing* in the NBA versus the median NBA salary. Like the median NBA salary figure, which does not include the salaries of the numerous players who have not made the NBA, the median NBA high school players' salary figure does not include

the salaries of those high school players who have not made the NBA. Therefore, by paralleling the computation method for the median NBA salary, the median NBA high school player salary provides a more accurate assessment of comparative NBA group salaries than the median high school player salary. By an increasingly wide margin, the median salary of the high school players playing in the NBA far exceeds the median NBA salary.

TABLE 14: MEDIAN PRO BASKETBALL EARNINGS (NBA HIGH SCHOOL PLAYERS)



Group	Basketball Salary in 01-02	% of 01-02 Median NBA Salary	Basketball Salary in 02-03	% of 02-03 Median NBA Salary	Basketball Salary in 03-04	% of 03-04 Median NBA Salary
Median NBA H.S. Player	\$3,502,500	147.9%	\$3,765,380	159.0%	\$4,062,965	165.4%
Median NBA Player	\$2,368,421	100.0%	\$2,368,200	100.0%	\$2,458,500	100.0%

Simply put, high school players in the NBA earn more money, and at a faster rate, than either their teammates or their competitors. This finding is evident whether using salary averages or salary medians, or whether using high school players actually in the NBA or not. Moreover, because most of the high school players have become or will become stars or superstars, this disparity in earning

potential should only increase in future seasons. Indeed, as will now be discussed, the rate at which they earn only accelerates as their careers advance, and as they obtain free agency.

3. Expanded Earnings Curve: The \$100 Million Difference Between Tyson Chandler & Shane Battier

Further shedding light on the financial incentives for star high school players to declare for the NBA Draft, we can analyze how they typically expand their earnings curve by joining the NBA at an early age—and thus becoming free agents at an earlier age as well. Indeed, the rookie salary scale likely animates superstar high school players to declare for the NBA Draft, since the scale clearly works to the disadvantage of top draft picks. For instance, whereas Glenn Robinson, the number one overall pick in the 1994 NBA Draft, received a 10-year \$68.15 million dollar contract, LeBron James, the number one overall pick in the 2003 NBA Draft, could negotiate no more than a three-year deal worth \$12.96 million with the Cleveland Cavaliers, and if the Cavaliers elect to extend him for a fourth season, it becomes a four-year deal worth \$18.79 million.¹⁸¹ Moreover, the Cavaliers will hold his rights for a fifth season if it extends him a qualified offer of \$7.58 million, thereby being able to match any contract which he signs with another team as a restricted free agent.¹⁸² In other words, James will earn less than the average NBA salary for at least his first four seasons, even though he was the number one overall pick and in the past, the number one overall pick immediately ascended to the top of the NBA pay scale.

Understandably, therefore, a star player may want to “pay his dues” and experience the rookie salary cap as early as possible. To illustrate this point, consider two highly regarded players from the 2001 NBA Draft: Tyson Chandler and Shane Battier. As the second overall pick in the NBA Draft, Chandler received a three-year deal worth \$10.67 million, with a club option for a fourth season at \$4.0 million. As the sixth overall pick in the NBA Draft, Battier received a three-year deal worth \$7.1 million, with a club option for a fourth season at \$2.7 million. Chandler signed his contract at 18 years of age; Battier at 22. By 2005, assume both players have become stars and both of their teams would like to re-sign them for the maximum allowable contract, which we will conservatively project as a seven-year, \$118 million dollar contract.¹⁸³ Assume both players re-

¹⁸¹ 1999 Collective Bargaining Agreement, *supra* note 20, at Exhibit B, available at <http://www.nbpa.com/cba/exhibits/exhibitB.html> (last visited Feb. 1, 2004).

¹⁸² *Id.*

¹⁸³ We reach this dollar amount through the following steps: First, Article II allows players who have completed seven years of service to receive contracts for amounts up to 30% of the salary cap in effect at the time the contract is executed. *Id.* at Art. II(7)(a)(2), available at

sign with their clubs, with Chandler signing the deal at age 22, while Battier is 26. Now fast-forward to 2011, with both players six years into their seven-year extensions. At this time, Chandler is 28 years old, while Battier is 32.

Before considering the future earning capacity of each player as they enter negotiations for a second extension, first observe how experts correlate age with performance. *The Sporting News* recently published its Top 50 Players list, and it noted the following, "When is an NBA player in his prime? Well, the average age of a player on our list of the top 50 is 27.1. Only 15 of the top 50 players are 30 or older."¹⁸⁴ Indeed, a player is usually seen as entering his "prime" at about the age of 27 or 28, and the "prime" typically lasts between three and four seasons.¹⁸⁵ In contrast, players older than 31 are often regarded as "teachers" or those whose glory days are behind them.¹⁸⁶ Regardless of how they are characterized, players signing contracts past the age of 31 earn considerably less than they would signing deals at a younger age: A review of current NBA contracts found that no player signed a deal for terms beyond four seasons after he turned 31 years old.¹⁸⁷ None of this should come as a surprise, however, as the NBA is a young man's profession. In fact, the average NBA career lasts only five seasons,¹⁸⁸ the average age for NBA players is 27.5,¹⁸⁹ only 13 players in the

<http://www.nbpa.com/cba/articleII.html#section7> (last visited Feb. 1, 2004). Second, Article VII stipulates that the salary cap will equal 48.04% of Projected BRI for such salary cap Year, less Projected Benefits (as defined in Article IV, Section 6) for such salary cap Year, divided by the number of Teams scheduled to play in the NBA during such salary cap Year, other than Expansion Teams during their first two Seasons in the NBA. *Id.* at Art.VII(2)(a)(1), available at <http://www.nbpa.com/cba/articleVII.html#section2> (last visited Feb. 1, 2004). Third, the salary cap number for the past five seasons are as follows: 2003-04: \$43.84 million; 2002-03: \$40.27 million; 2001-02: \$42.5 million; 2000-01: \$35.5 million; 1999-2000: \$30.0 million. J.A. Adande, *Clippers Must Put Up or Players Won't Shut Up*, L.A. Times, Apr. 6, 2002, § Sports, at 1; Mike Kahn, *Salary Cap Set at \$42.5 million*, CBS Sportsline, July 18, 2001, available at http://cbs.sportsline.com/u/ce/multi/0,1329,4106741_54,00.html; *Salary Cap for 2003-04 Season Set at \$43.84 million*, NBA.com, July 15, 2003, available at http://www.nba.com/news/cap_030715.html; 1999 Collective Bargaining Agreement, *supra* note 29, at Art.VII(2)(a)(4), available at <http://www.nbpa.com/cba/articleVII.html#section2> (last visited Feb. 1, 2004). Fifth, the salary cap has therefore increased by 41.6% in two seasons. Finally, therefore, even if this trend slows dramatically, the salary cap in 2005 should be no less than \$56 million, and 30% of \$56 million is \$16.8 million, and \$16.8 million per year over a course of seven-year contract yields \$117.6 million.

¹⁸⁴ Graf, *supra* note 101, at 13.

¹⁸⁵ Lacy C. Banks, *Armstrong May Be First Pick in Draft*, Chi. Sun-Times, June 22, 1995, at 128. For example, Tom Gugliotta was seen entering his prime at age 27. T'Wolves Taking Step Backward, N.Y. Post, Dec. 20, 1997, at 045, available at LEXIS, News Group.

¹⁸⁶ To illustrate this point, after he turned 34, Terry Porter was seen as "content to be a teacher." *Id.*

¹⁸⁷ David Dupree, 2001-02 NBA Salaries, USA Today, Nov. 15, 2001, available at <http://www.usatoday.com/sports/nba/stories/2001-02-salaries.htm>.

¹⁸⁸ Arn Tellem, *NBA's Plan to Limit Youngsters No More than Hollow Altruism*, N.Y. Times, May

NBA are older than 35 (or just 3.1% of all NBA players),¹⁹⁰ only eight are older than 36 (1.9%),¹⁹¹ and the oldest NBA player, Kevin Willis, recently turned 41.

Therefore, it seems plausible to believe that Chandler, at 28, is in a far better negotiating position than Battier, at 32. For Battier to demand another seven-year extension for the maximum seems far-fetched; to do so would likely make him the first 32 year-old NBA player to persuade his team to agree to such a long-term contract. For Chandler, however, a seven year deal seems reasonable, particularly considering it would compensate a player whose best days were ahead of him—his prime basketball days. Indeed, a number of current NBA players signed maximum seven-year contracts when they were 27 or 28 years old, including Grant Hill (at age 27 years, 10 months old, signed a \$92 million contract) and Jalen Rose (at 27 years, 8 months old signed a \$93 million contract).¹⁹²

It is precisely at this point in their careers—when Chandler and Battier are both eligible for their second contract extension—where Chandler is most better off because of bypassing college for the pros. In 2011, Chandler may be able to sign a maximum contract worth over \$150 million, while Battier would likely be looking at a far different contract parameter, indeed one that is significantly shorter in length and dollars. Arn Tellem, a renowned agent, confirms this point when discussing Kevin Garnett. Although Garnett signed a contract extension that would no longer be allowed under the 1999 CBA, his example proves illustrious. As noted earlier, Garnett signed a six-year, \$120 million deal when he was 21 years old, and in October 2003, Garnett – at age 27 – signed a five-year, \$100 million contract extension.¹⁹³ By doing so, Garnett fulfilled Tellem's prediction from 2001: "In Garnett's case, those four extra years of college could

13, 2001, § 8, at 11.

¹⁸⁹ Dana Pennett O'Neil, *Generation Next*, Knight Rider/Tribune News Service, Mar. 12, 2002.

¹⁹⁰ As of October 1, 2003, the following 14 players were older than 35: Kevin Willis (41), Karl Malone (40), Mark Jackson (38), Scottie Pippen (38), Reggie Miller (38), Avery Johnson (38), Horace Grant (38), Dikembe Mutombo (37), Anthony Mason (36), Clifford Robinson (36), Ervin Johnson (36), Tony Massenburg (36), Mitch Richmond (36). There are approximately 435 NBA players in the NBA (each of the NBA's teams has an active roster of 12 players, with three additional roster spots for injured players, so at any given time, there are $15 \times 29 = 435$ players).

¹⁹¹ Subtract from the previous list the following players who are 36: Mason, Robinson, Johnson, Massenburg, and Richmond.

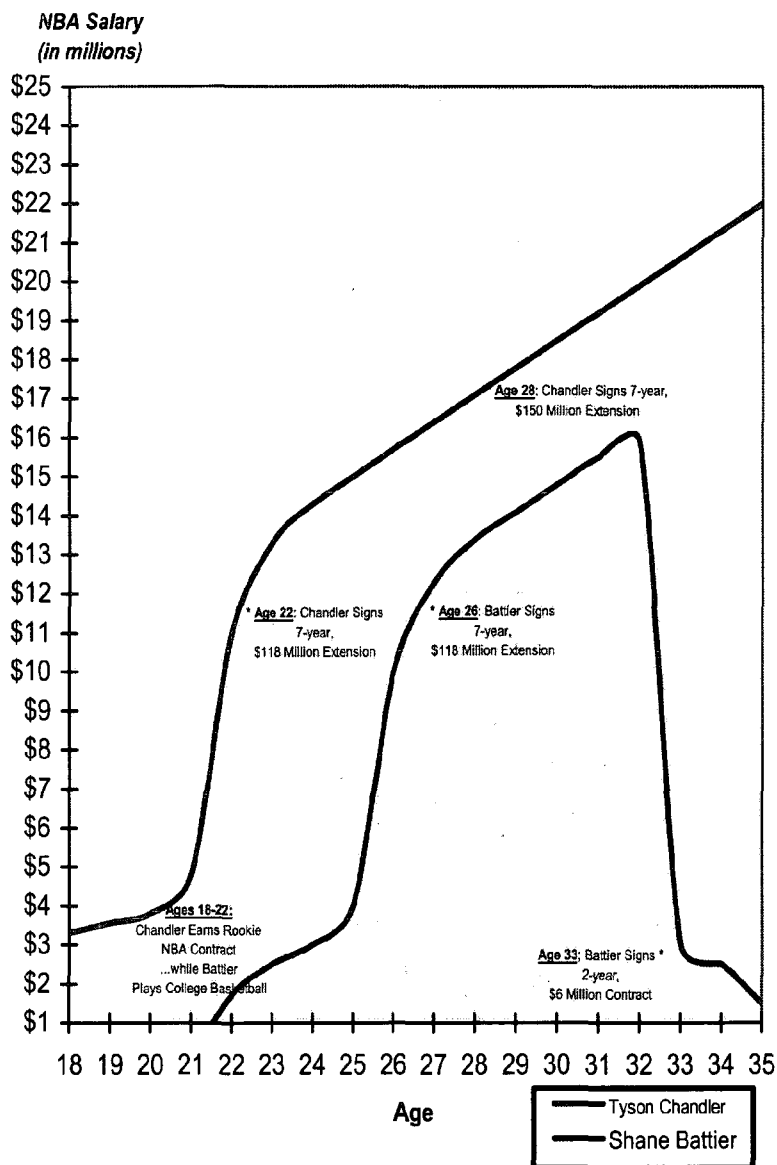
¹⁹² Dupree, *supra* note 187. For information on Grant Hill's contract, see Anwar S. Richardson, *Magic Tricks Sign Hill*, *McGrady*, *Tampa Trib.*, Aug. 4, 2000, § Sports, at 1. For information on Jalen Rose's contract, see *NBA Beat*, *Orlando Sentinel*, Aug. 3, 2000, at C6 (noting Rose's age when he signed his contract).

¹⁹³ Deal Expected to Average \$20 Million Per Year, *ESPN Wire Services*, available at <http://sports.espn.go.com/nba/news/story?id=1627940>.

have cost him as much as \$100 million.”¹⁹⁴

¹⁹⁴ Tellem, *supra* note 188.

TABLE 15: POTENTIAL NBA EARNINGS CURVE OF H. S. PICK V. COLLEGE SENIOR PICK



4. Missing "Class" (Debunking the "Value" of a College Education for Top NBA Prospects)

Alternatively, some argue that discussion of financial gain overlooks an important personal cost to these players: the value of a college education. For instance, Rudy Tomjanovich, former head coach of the Houston Rockets, states, "I really do believe that the four years of college are so important in the development of a person. I'm not talking about basketball; I'm talking about their development as a person."¹⁹⁵ Likewise, Jerry Dunn, former head coach of the Penn State men's basketball team, believes, "They're completely skipping a part of their lives they can never get back. All of a sudden you can't turn back, and the responsibilities become greater. They're skipping the basic foundation they need to take care of themselves and their families for the rest of their lives."¹⁹⁶ Commissioner Stern echoes this sentiment when stating, "School is becoming an irrelevancy."¹⁹⁷

In contrast, however, some high school players are skeptical of the "value" of a college education, particularly when they watch their friends on college basketball teams spending most of their time playing basketball. In fact, it is estimated that Division I college players spend at least 40 hours a week practicing, lifting weights, attending team meetings, traveling, and playing.¹⁹⁸ More concerning, some high school players wonder whether their putative college coaches would have been more interested in their college programs than in their players' welfare. To illustrate this point, Billy Donovan, head coach at the University of Florida, apparently tried to persuade Kwame Brown to attend Florida by telling Brown that he would not have been a lottery pick, even though Donovan privately acknowledged to others that he was certain of Brown's lottery status. Donovan later apologized to Brown for his disingenuousness.¹⁹⁹

The "value" of a college education also rings hollow to those high school players who recognize that their future earnings will be determined more by their basketball savvy than by their academic knowledge.²⁰⁰ That is, if a college education is so important, why do most drafted players leave college before they graduate? For instance, in the 2001 NBA Draft, only four out of the 28 first

¹⁹⁵ Michael Murphy, *Lewis' Decision Revives Debate*, Hous. Chron. Apr. 17, 1998, at 7.

¹⁹⁶ Phil Axelrod, *What's the Rush?*, Pittsburgh Post-Gazette, June 26, 1996, at D6.

¹⁹⁷ Jim Litkie, *Stern's real concern: NBA's on-job training*, Associated Press, May 2001, available at <http://www.examiner.com/sports/default.jsp?story=sp.litkenba.0517w>.

¹⁹⁸ Michael Wilbon, *Graduation Rates Deceive*, Wash. Post., Mar. 28, 2002, at D1.

¹⁹⁹ Nolan Nawrocki, *College: Risk or Advantage?*, Basketballnews.com, June 21, 2001, at http://www.basketballnews.com/content/nba/nba_set.asp?main=hstonba1_062101.asp.

²⁰⁰ Indeed, with all the practice and game time away from class, Brown wonders, "sometimes those college degrees those basketball players get anyway, they never use." *Id.*

round picks were college seniors, which equaled the number of college freshman and was three fewer than the number of college sophomores.²⁰¹ Even college players without realistic aspirations of making the NBA often fail to graduate. To evidence this point, consider that the University of Connecticut graduated only 27% of its men's basketball players from 1999 to 2002; similarly, from 1991 to 1995, the University of Maryland graduated only 19% of its players, while the University of Oklahoma failed to graduate even one member of its men's basketball team.²⁰²

Whatever "value" college may provide these players can, of course, be gained later in their lives, *after* they have made their millions. Indeed, Bill Willoughby returned to college after his career ended, and a number of present and former NBA stars did the same, or even earned degrees while playing in the NBA, among them Isaiah Thomas, Julius Erving, Shaquille O'Neal, and Vince Carter.²⁰³ Considering that entering the NBA at an early age can pay enormous dividends, particularly towards the middle of a player's career, it is not surprising that such players find the most intelligent course to be playing first and studying second.²⁰⁴

²⁰¹ See NBA Draft.net, *supra* note 1, at <http://nbadraft.net/2001.htm> (last visited Feb. 1, 2004).

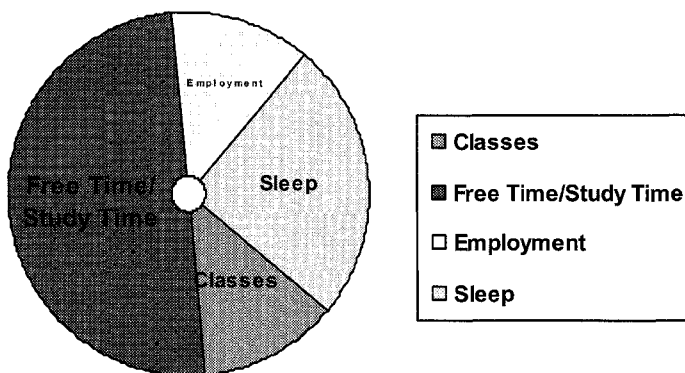
²⁰² Don Walker, NCAA Banks on Final Four Frenzy, *Milwaukee J. Sentinel*, Apr. 3, 2002; see also Liz Clarke, Graduating Rates Lagging, *Wash. Post*, Mar. 23, 2004, at D06.

²⁰³ Gary Hill, Kids Opting for Draft Dollars over College, *Reuters*, May 18, 2001, available at LEXIS, News Group.

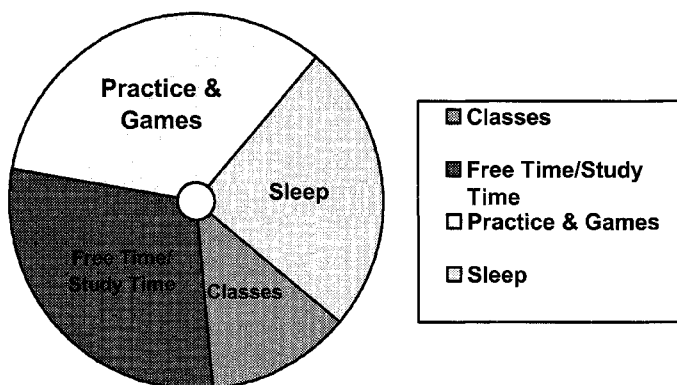
²⁰⁴ As stated by Kwame Brown, who was one of eight children with a single mother, "If you're 17 or 18 years old, you can go to jail, you can go to the military, you can fight and die for your country—why not go play basketball for money? It's a job. Why can't you just go to work?" Nawrocki, *supra* note 199.

CHART 2: COMPARING AVERAGE DAY IN THE LIFE OF A COLLEGE STUDENT WITH THAT OF A COLLEGE BASKETBALL PLAYER

Average Day of College Student



Average Day of College Basketball Player



5. Opportunism & Avoiding Regret

As a final consideration, one can weigh the financial risk undertaken by superstar high school players who do *not* enter the NBA Draft. Some argue that the longer one plays as an amateur, the less intriguing the player becomes to NBA scouts. For instance, Brendan Haywood, who played four seasons at the University of North Carolina and was drafted 20th overall by the Washington Wizards in the 2001 NBA Draft, complains that he was penalized for staying in school: "The longer you stay, the more they're going to criticize your game. The shorter you stay, the more they'll draft you on potential."²⁰⁵ In other words, the longer a player remains in school, the more likely NBA teams will extrapolate his performance as indicative of his likely success in the NBA, rather than using indicators based more on raw physical traits, such as speed, strength, and leaping ability. As a result, NBA teams expect college players to make an immediate impact, whereas high school players are viewed more as developmental players.²⁰⁶ As evidenced by Haywood, college players, and particularly those who stay until their junior or senior seasons, have a narrower margin for error than do high school players.

To illustrate this point, consider the star-crossed basketball career of Randy Livingston, a point guard who starred at Newman High School (LA) in the early 1990s. As a highly acclaimed high school player, Livingston was honored as the nation's number one high school recruit in both 1991 and 1992,²⁰⁷ won the Naismith Award as the top prep player, and led his high school to three consecutive state titles.²⁰⁸ Some even compared him to a young Magic Johnson.²⁰⁹ At the time, however, entering the 1993 NBA Draft would have been controversial, both because Bill Willoughby had been the last player to do so in 1975, and because Livingston was a guard, whereas the previous entrants

²⁰⁵ Michael Murphy, *Going Straight from High School to the Pros was Once Unheard of, but the Success of Players like Kobe Bryant and Kevin Garnett has More and More Teens Trying to Make the Leap*, Hous. Chron., June 24, 2001, § 2, at 17.

²⁰⁶ For example, John Lucas, former head coach of the Cleveland Cavaliers, believes, "You can't expect high-school guys to come in here and play in this league." Don Wade, *Growing Pains—High Draft Selection Doesn't Guarantee NBA Stardom*, Com. Appeal (Memphis, TN), Dec. 25, 2001, at D1. This has been evident in pre-draft hype for the 2002 NBA Draft. For instance, an online publication summarized Amare Stoudemire as the following: "he has the upside that scouts covet and he's a lock for the lottery. Everyone is always afraid they'll miss out on a potential Tracy McGrady or Kevin Garnett" ESPN.com, ESPN.com Draft Tracker, at

<http://sports.espn.go.com/nbadraft/tracker/player?playerId=18345> (last visited Feb. 1, 2004).

²⁰⁷ Bill Campbell, *I Think I've Paid the Price*, Times-Picayune, Oct. 29, 1995, at C1.

²⁰⁸ John DeShazier, *Livingston Works Hard to Stay in Game*, Times-Picayune, Mar. 28, 2002, at 1.

²⁰⁹ *Id.*

(Dawkins and Willoughby) were centers.

Instead, Livingston attended Louisiana State University ("LSU"). Right before the start of his freshman year, however, he tore his right anterior cruciate ligament. Though he recovered from the injury, his play was unspectacular.²¹⁰ As a result, Livingston approached the 1996 NBA Draft with skepticism and regret, "I don't know if I'll make \$3 million a year or not even \$30,000 in my first job."²¹¹ Unfortunately for Livingston, his mediocre performance and injury history at LSU dropped his stock in the eyes of NBA scouts. Consequently, he was selected 42nd overall (second round) by the Houston Rockets, prompting one draft publication to remark, "too bad Houston didn't draft [Livingston] out of high school, when he was one of the nation's top recruits."²¹² Instead of being an almost certain first round pick had he declared for the NBA Draft out of high school, Livingston has meandered through the quintessential "journeyman" NBA career. Over the past eight seasons, Livingston has played in short stints for nine NBA teams, though has been released or waived 10 times, thereby earning only pro-rated portions of the NBA minimum. He has also played in the Continental Basketball Association for three seasons.²¹³

B. Interests of the NBA

Although most high school players who have elected to declare for the NBA Draft have done well, if not spectacularly, the NBA maintains that it would be better off by instituting a rule preventing their direct ascent. There are five primary reasons cited by the NBA for banning high school players from the NBA Draft: concern for the high school players' welfare; desire to produce the best quality basketball product; dislike of risk inherent in drafting and developing high school players; and preference to limit opportunities for manipulative agents. Uncited, though perhaps most explanatory is that college basketball programs, their schools, and myriad commercial interests may be encouraging the NBA to steer superstar high school players to college.

1. "Life Experiences" & Paternalism

This Section will begin with a discussion of the NBA's concern for high school players who bypass college for the pros. Simply put, concern for the welfare of high school players can approach blatant paternalism. For instance,

²¹⁰ Livingston averaged only 6 points per game and shot only 29% from the field. Lee Feinswog, *LSU Needs More than Earl to Turn Program Around*, Advocate (Baton Rouge, LA), Apr. 28, 1996, at 3C.

²¹¹ DeShazier, *supra* note 208.

²¹² Ethan J. Skolnick, *Grading the Draft*, Palm Beach Post, June 27, 1996, at 6C.

²¹³ DeShazier, *supra* note 208; see also Player Profile: Randy Livingston, Hoops Hype, available at http://www.hoopshype.com/players/randy_livingston.htm (last visited Oct. 8, 2003).

John Thompson, former head coach of Georgetown University men's basketball team, analogizes recent high school graduates playing in the NBA with early adolescents driving cars: "I might know how to drive a car when I'm 13, but they don't let me get a license."²¹⁴ Likewise, Commissioner Stern remarks, "If these kids have the ability to get a little more maturity, a little more coaching, a little bit more life experience overall, that's good."²¹⁵

When assessing these players, however, we notice a trend: almost all of them have been "good citizens" in the NBA, and have stayed out of trouble. Indeed, of the 29 players, only Ellis Richardson, DeShawn Stevenson, and Kobe Bryant have had criminal charges brought against them, and in the case of Stevenson, those charges were subsequently dropped.²¹⁶ Quite the opposite, many of the 29 players have been praised for their work in the community, such as Tyson Chandler and Eddy Curry, who were recently highlighted for their work with underprivileged children in Chicago,²¹⁷ and Al Harrington, who has actively participated in the Pacers All-Star Reading Team, where Pacers players visit elementary schools and read stories to students.²¹⁸ Furthermore, teams possess economic incentives to help ease the transition of a high school player into an NBA player. For instance, the Minnesota Timberwolves offered Kevin Garnett the option of living with a surrogate family, as well as social outings with basketball players from the University of Minnesota.²¹⁹

A similar failing of paternalism rests in the fact that other professional sports have featured well-respected stars who also bypassed college. For instance, Chris Evert, Pete Sampras, Andre Agassi, Venus and Serena Williams, Wayne Gretzky, Mario Lemieux, Eric Lindros, Alex Rodriguez, Ken Griffey Jr., and Derek Jeter all bypassed college, yet all are considered both superstar athletes and law-abiding citizens.²²⁰

Despite the high school players' overall track record of achievement, for those high school players who failed to make the NBA—all seven of them—their high school coaches are often implored to explain, "What went wrong?"

²¹⁴ Sam Farmer, *Early Risers*, LA Times, June 26, 2001, § Sports, at 1.

²¹⁵ Murphy, *supra* note 205.

²¹⁶ Sports in Brief, *supra* note 129.

²¹⁷ Nathan: Pro Basketball Player Hopeful Says He Has Plan B, NBC 5 News, Sept. 4, 2002, available at <http://www.nbc5.com/wednesdayschild/1648700/detail.html>.

²¹⁸ All-Star Reading Team Visits Schools, pacers.com, Feb. 28, 2003, http://www.nba.com/pacers/community/reading_timeouts.html; see also Sharper Image Online Auction of Kobe Bryant-Signed Basketballs Raises Thousands for Charity, *Bus. Wire*, Apr. 24, 2001 (Kobe Bryant was honored by the Los Angeles Boys and Girls Clubs for his volunteer work with inner-city youths).

²¹⁹ Evans, *supra* note 105.

²²⁰ Tellem, *supra* note 188.

For instance, Kevin Keats, who was Korleone Young's high school coach, believes Young, who essentially forfeited his collegiate eligibility to play one year in the NBA, represents one of many "kids [who] always talk about this life-long dream to play in the NBA. And they all think they're going to go early. But I push for school. If a kid got into college and did well, he still has a chance to be a great NBA player down the road. And he would have gotten the college experience."²²¹ Along these lines, Sharon Shields, a professor of human development at Vanderbilt University warns, "... we have the injustice (in our sports society) where we make every kid believe they too can have The Dream."²²²

On the other hand, maybe Korleone Young would never have been good enough to make it in the NBA. Indeed, for the past three seasons, he has played a great deal of professional basketball, from the Continental Basketball Association to the Australian League and now in Russia, though his performance against inferior talent has not stood out. As put bluntly by Alvin Gentry, Young's NBA coach, "He wasn't ready from a *talent* standpoint."²²³ In other words, Young may have been an inferior player in college as well – he may have simply never become a very good basketball player. Then again, how many players selected 40th overall ever become good players in the NBA?²²⁴ To help answer this question, below is a list of the five players who were selected immediately before Young in the 1998 NBA Draft. Observe that of the five, two are out of the League, and three are fringe or mediocre players:

35. Bruno Sundov (third-string center for the New York Knicks);
36. Jerome James (second-string center for the Seattle Supersonics);
37. Casey Shaw (out of the NBA; currently playing for Virtus Roma in the Italian "A" Basketball League);
38. Demarco Johnson (out of the NBA; currently playing for Olympiakos S.F.P. Pireus in the Greek "A1" Basketball League);
39. Rafer Alston (second-string point guard for the Miami Heat).

Besides, even if we consider Young a "failure," bear in mind that at age 19, he earned \$289,750 to play in the NBA, and over the past three seasons, has earned between \$50,000 and \$100,000 per year to live abroad and play two or three basketball games a week for eight months of the year.²²⁵ Compare his

²²¹ Drehs, *supra* note 96.

²²² Bryan Burwell, Tiger lives The Dream; McDavid lives nightmare, USA Today, Aug. 29, 1996, at 12C.

²²³ Niyo, *supra* note 99 (emphasis added).

²²⁴ Sean Deveney, The kids are all right, Sporting News, June 26, 2001, at 30.

²²⁵ See *infra* note 180(f).

earnings to the median salary for single males in the United States (\$31,267),²²⁶ or the median starting salary for college graduates (\$41,000).²²⁷ Alternatively, compare Young's work schedule to that of the average American, who works an average of 43.4 hours a week, 11 months a year.²²⁸ In other words, although Young enjoys neither the fruits of a NBA career nor the rewards of a college education, he works substantially less to earn considerably more than does the average American.

**TABLE 16: COMPARING "FAILED" LIFE OF KORLEONE YOUNG
WITH THAT OF "SUCCESSFUL" COLLEGE GRAD**

<u>Person</u>	<u>Annual Salary</u>	<u>Hours of Work per Week</u>
Korleone Young	\$75,000	30
Median College Graduate	\$41,000	43

The plight of Taj McDavid has also been highlighted as a warning to those high school basketball players interested in pursuing the NBA. McDavid went undrafted in the 1996 NBA Draft, and, as the story goes, returned home to

²²⁶ Carmen DeNavas Walt, Money Income in the United States 2000, United States Census Bureau, Sept. 2000, available at <http://www.census.gov/prod/2001pubs/p60-213.pdf> (last visited Feb. 1, 2004). Note also that the median household income in the United States is \$41,789. *Id.*

²²⁷ The Graduate Management Admission Council conducted this survey. D.C. Denison, Back to Basics, Boston Globe, Mar. 31, 2002, at C1.

²²⁸ Federal Bureau of Labor statistics. Karen Schill Rives, Rising Telecomplaints, News & Observer (Raleigh, N.C.), May 10, 2001, at D1.

Williamstown, South Carolina, where he lives with his parents and can often be found playing pick up basketball.²²⁹ Characterizing McDavid as a failure, however, seems to ignore the fact that even Division I college basketball programs were not interested in him. For one, McDavid would have been academically ineligible to play his first season in Division I college basketball, though had he been recruited, a college could have simply "red-shirted" him for one season, thus allowing him time to overcome his academic failings. Not even one Division I college basketball program, however, expressed any interest in offering McDavid an athletic scholarship.²³⁰ Not surprisingly then, NBA teams, European teams, and minor league teams were not interested in him either. None of this is startling, since McDavid, who only played in the state's third best high school basketball conference, excelled against inferior high school basketball players.²³¹ On a more basic level, therefore, if McDavid was not good enough to play Division I college basketball, then declaring for the NBA Draft came at no expense: He only lost the eligibility for something which he was already incapable of obtaining.

2. Protect the "Game" (and the Coaches' & General Managers' Jobs Too)

Another interest of the NBA rests in its desire to produce the best quality basketball product, and to feature players whose skills are most refined. Predictably, because 18 year-old basketball players are very early in their development, their games are often exploited initially in the NBA. Although television ratings, attendance figures, merchandise sales, and gate receipts for the 2003-04 NBA season are all up from the 2002-03 season, suspicion persists that as the NBA features younger, less refined players, fan interest declines.²³² As a result, some argue that by forcing players to play at least one season in college basketball, where they would likely obtain more playing time than if they spent the year in the NBA, their games would benefit immeasurably, thereby elevating

²²⁹ Drehs, *supra* note 96; see also Evans, *supra* note 105.

²³⁰ Berkow, *supra* note 99.

²³¹ McDavid played in the Class AA Basketball Conference. May, *supra* note 73.

²³² Thus far in the 2003-04 NBA season, television ratings for games broadcast on ESPN have increased by 25%; on Turner Network Television, they have increased by 40%. Sekou Smith, Commissioner Likes Direction, *Indianapolis Star*, Feb. 27, 2004, at 1D. Likewise, NBA attendance, gate receipts, and merchandise sales have all increased this season. *Id.* Nevertheless, some observers opine that the NBA has suffered with the influx of younger players. For instance, Mark Ganis, a sports marketing expert, contends "on a marketing level it's been a real drawback for the NBA to have all these freshmen and high school players in the league." Chris Isidore, NFL Youth Movement has its Limits, *CNN Money*, Sept. 12, 2003, at http://money.cnn.com/2003/09/12/commentary/column_sportsbiz/sportsbiz/.

the overall quality of the NBA product.²³³

Likewise, general managers of NBA teams often complain that their scouting efforts are devoted too much to scouting high school players. For instance, Jerry Reynolds, director of player personnel for the Sacramento Kings, remarks, "I think everybody would be better with an age limit. The teams would benefit, because you'll still get the same guys but they'll be older and better prepared."²³⁴ Similarly, Donnie Walsh, former president of the Indiana Pacers, worries that selecting 18 year olds is too unpredictable, thus unfairly burdening basketball's most astute minds: "If a general manager is going to get judged—and judged harshly—for missing the next Kobe, then he's going to have to [scout] eighth grade. In fact, he'd get fired if he weren't and missed a player."²³⁵

Like the other arguments proffered by the NBA, this one largely fails to correspond with the facts. First, general managers are fired for misjudging talent at every level, be it at high school, college, or the pros. To illustrate this point, Rick Pitino, former general manager and coach of the Boston Celtics, was not considered a failure because he was unable to uncover high school talent. Instead, Pitino failed because he misjudged the pro talent of his own players, including even those whom he coached while at the University of Kentucky (*e.g.* Walter McCarty and Ron Mercer) or coached against in college (*e.g.* Chauncey Billups). Besides, even if high school players were banned, and NBA general managers could instead focus on drafting players who would more immediately help their teams, some teams would still win games and some teams would still lose games, and general managers of losing teams would still get fired.

Second, the 1999 CBA recognizes a prolonged approach to player development by ensuring that teams can retain their first round picks for at least four seasons. If the NBA really wanted to encourage teams to select more seasoned amateur players, it would have insisted during the last CBA negotiations that first round picks have access to unrestricted free agency sooner in their careers, as teams would then be enticed to draft players who would benefit them most in the short-run. The NBA, however, insisted on the very opposite during those negotiations.²³⁶

Third, rookie performances of high school players are simply not indicative of how well those players will perform after two or three seasons. In fact, when we assess the high school players who have already entered the NBA, we notice a

²³³ For instance, former University of Georgia head coach Jim Harrick states, "In the NBA, you just don't get to practice. In college, you practice. You learn fundamentals. Conditioning. A guy going from high school to the NBA? It's ludicrous." Wallace, *supra* note 179.

²³⁴ Farmer, *supra* note 214.

²³⁵ *Id.*

²³⁶ See *supra*.

distinct trend: They struggle during their first season, and sometimes during their second season, but then explode into stars during their third or fourth seasons.²³⁷

While they may play little during their rookie season, they are apparently developing their games, whether by practicing against superior players, or by playing in summer leagues:

TRACY McGRADY											
AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
18	97-98	Tor	64	18.4	.450	.712	1.0	0.8	4.2	1.5	7.0
19	98-99	Tor	49	22.6	.436	.726	1.3	1.1	5.7	2.3	9.3
20	99-00	Tor	79	31.2	.451	.707	1.9	1.1	6.3	3.3	15.4
21	00-01	Orl	77	40.1	.457	.733	1.5	1.5	7.5	4.6	26.8
22	01-02	Orl	76	38.3	.451	.748	1.0	1.6	7.8	5.3	25.6
23	02-03	Orl	75	39.4	.457	.793	0.8	1.7	6.5	5.5	32.1
24	03-04	Orl	45	39.5	.422	.810	0.8	1.4	6.0	5.6	27.1

KOBE BRYANT											
AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
18	96-97	Lal	71	15.5	.417	.819	0.3	0.7	1.9	1.3	7.6
19	97-98	Lal	79	26.0	.428	.794	0.5	0.9	3.1	2.5	15.4
20	98-99	Lal	50	37.9	.465	.839	1.0	1.4	5.3	3.8	19.9
21	99-00	Lal	66	38.2	.468	.821	0.9	1.6	6.3	4.9	22.5
22	00-01	Lal	68	40.9	.464	.853	0.6	1.7	5.9	5.0	28.5
23	01-02	Lal	80	38.3	.469	.829	0.4	1.5	5.5	5.5	25.2
24	02-03	Lal	82	41.5	.451	.843	0.8	2.2	6.9	5.9	30.0
25	03-04	Lal	34	36.6	.422	.852	0.3	1.8	4.9	4.4	21.9

RASHARD LEWIS											
AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
18	98-99	Sea	20	7.3	.365	.571	0.1	0.4	1.3	0.2	2.4
19	99-00	Sea	82	19.2	.486	.683	0.4	0.8	4.1	0.9	8.2
20	00-01	Sea	78	34.9	.480	.826	0.6	1.2	6.9	1.6	14.8
21	01-02	Sea	71	36.4	.468	.810	0.6	1.5	7.0	1.7	16.8
22	02-03	Sea	77	39.5	.452	.820	0.5	1.3	6.5	1.7	18.1

²³⁷ Key: *Yr*: NBA season; *TM*: team; *G*: number of regular season games played; *MIN*: avg. minutes played/games; *FG%*: season field goal %; *FT%*: season free throw %; *BLK*: avg. blocked shots/game; *ST*: avg. steals/game; *REB*: avg. rebounds/game; *AST*: avg. assists/game; *PTS*: avg. points/game. 03-04 statistics current as of Jan. 28, 2004.

23	03-04	Sea	42	37.2	.438	.789	0.8	1.1	7.2	2.2	18.8
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AL HARRINGTON

AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
18	98-99	Ind	21	7.6	.321	.600	0.1	0.2	1.9	0.2	2.1
19	99-00	Ind	50	17.1	.458	.703	0.2	0.5	3.2	0.8	6.6
20	00-01	Ind	78	24.3	.444	.656	0.2	0.8	4.9	1.7	7.5
21	01-02	Ind	44	29.8	.475	.799	0.5	0.9	6.3	1.2	13.1
22	02-03	Ind	82	30.1	.434	.770	0.4	0.9	6.2	1.5	12.2
23	03-04	Ind	45	30.9	.452	.752	0.3	1.0	6.7	1.8	13.1

JERMAINE O'NEAL

AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
18	96-97	Por	45	10.2	.451	.603	0.6	0.0	2.8	0.2	4.1
19	97-98	Por	60	13.5	.485	.506	1.0	0.3	3.3	0.3	4.5
20	98-99	Por	35	8.9	.434	.514	0.4	0.1	2.8	0.4	2.6
21	99-00	Por	70	12.3	.486	.582	0.8	0.2	3.3	0.3	3.9
22	00-01	Ind	81	32.6	.465	.601	2.8	0.6	9.8	1.2	12.9
23	01-02	Ind	72	37.6	.479	.688	2.3	0.6	10.5	1.6	19.0
24	02-03	Ind	77	37.2	.484	.731	2.3	0.9	10.3	2.0	20.8
25	03-04	Ind	45	37.0	.440	.760	2.8	0.8	10.6	2.0	21.0

TYSON CHANDLER

AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
18	01-02	Chi	71	19.6	.497	.604	1.3	0.4	4.8	0.8	6.1
19	02-03	Chi	75	24.4	.531	.608	1.4	0.5	6.9	1.0	9.2
20	03-04	Chi	10	28.6	.494	.787	1.3	0.5	10.3	1.0	13.0

EDDY CURRY

AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
18	01-02	Chi	72	16.0	.501	.656	0.7	0.2	3.7	0.3	6.7
19	02-03	Chi	81	19.4	.585	.624	0.8	0.2	4.3	0.5	10.5
20	03-04	Chi	38	26.9	.494	.712	0.9	0.2	5.9	0.7	12.3

KWAME BROWN

AGE	TM	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS
19	01-02	Was	57	13.3	.387	.707	0.5	0.3	3.5	0.8	4.5
20	02-03	Was	80	22.2	.446	.668	1.0	0.6	5.3	0.7	7.4

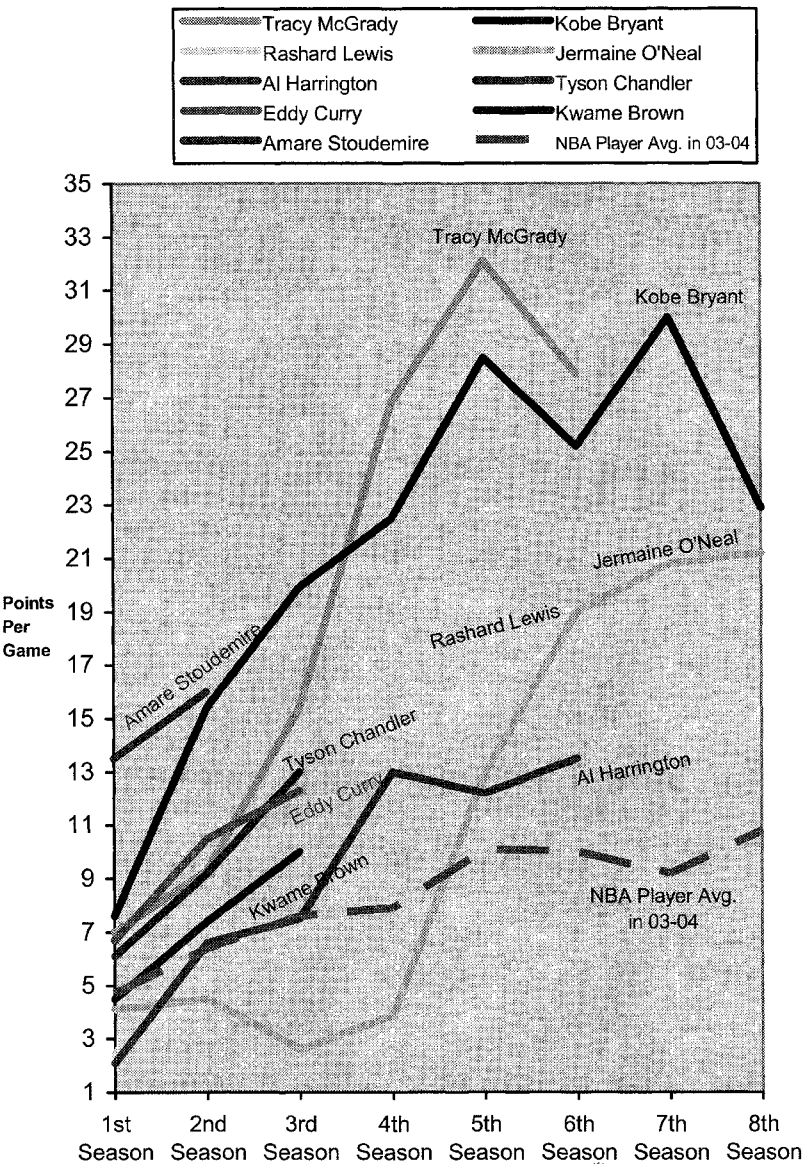
21	03-04	Was	43	27.4	.473	.750	0.7	1.0	7.0	1.5	10.0
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AMARE STOUDEMIRE												
AGE	YR	TM	G	MIN	FG PCT	FT PCT	BLK	ST	REB	AST	PTS	
18	02-03	Phx	82	31.3	.472	.661	1.1	0.8	8.8	1.0	13.5	
19	03-04	Phx	23	33.5	.475	.700	1.4	1.1	8.3	1.1	16.0	

COMPARE

2003-04 AVG. POINTS PER GAME OF ALL NBA PLAYERS PER THEIR CURRENT YEAR IN LEAGUE (THROUGH 8 TH YEAR PLAYERS)							
Rookies	2 nd Year	3 rd Year	4 th Year	5 th Year	6 th Year	7 th Year	8 th Year
4.7	6.4	7.6	7.9	10.1	10.0	9.2	11.2

TABLE 17: SCORING PROGRESSION OF SELECTED HIGH SCHOOL DRAFT PICKS



These statistics also counter claims that the rookie struggles of Kwame Brown, Tyson Chandler, and Eddy Curry are evidence of poor decisions to bypass college. Indeed, if the rookie struggles of Tracy McGrady, Kobe Bryant, and Rashard Lewis are at all indicative of future performance, then Brown, Chandler, and Curry should be quite optimistic about their own NBA futures. This is especially evident when comparing the career scoring progression of high school players with the 2003–04 scoring average of all NBA players per their current year in the league (through eight-year players):

3. Manipulative Agent Syndrome

The NBA has also expressed concern that high school players are particularly susceptible to opportunistic agents. For instance, Marty Blake, director of scouting for the NBA, believes, “The kids are getting bad advice in some cases. Some just can’t play.”²³⁸ This concern was amplified during the Myron Piggie scandal. Piggie, a convicted crack dealer and summer league coach of some of Kansas City’s most talented teenage basketball players, was sentenced to prison for paying some of the players, including Korleone Young, to use him as their representative.²³⁹ Piggie, in turn, used their representation to gain a “consulting” position with Nike that paid him over \$500,000.²⁴⁰

The flaw with the “evil agent” explanation for high school players entering the NBA Draft is that over 67% of those players were drafted in the first round, thus suggesting that they were not given bad advice. Along these lines, if greedy agents were tricking unwitting high school players into turning pro, we would expect a larger number of undrafted high school players, or at least second round picks, but only 17% of high school players who entered the NBA Draft were not drafted, and only 17% were selected in the second round. Yet, upon further reflection, the greedy agent scenario seems even more far-fetched when we consider that agents typically receive a commission of only 4%²⁴¹ of their clients’ salary, thus giving them little incentive to encourage marginal players to enter the NBA Draft. Indeed, undrafted players who play in the minor leagues often earn less than \$50,000 a year.²⁴² Even if we consider second round picks evidence of bad advice, keep in mind that only 17% of high school players have

²³⁸ Skolnick, *supra* note 176. Similarly, when describing the impetus for the April 2002 modifications, Jane Jankowski, a NCAA spokeswoman, declares, “a lot of times [high school players] receive bad advice.” Schain, *supra* note 76.

²³⁹ Bill Campbell, *Meet Market*, Dallas Morning News, May 28, 2000, at 26B.

²⁴⁰ *Id.*

²⁴¹ Bob Kravitz, *Minimum Age Arguments Don’t Add Up*, Indianapolis Star, June 22, 2001, available at www.starnews.com/print/articles/kcol22.html.

²⁴² See *infra* note 180.

been selected in the second round. Besides, second round picks typically sign contracts that pay the NBA minimum, and because agents receive a 4% commission, those contracts provide a commission fee of a comparatively meager \$14,680²⁴³—which again suggests that they have little financial motive to provide bad advice.

4. The Unspoken Reason: Preserving the Profitability of College Basketball

A more salient interest for the NBA appears to relate to the NCAA and the television broadcasts of its marquee games. This interest can be explored in several steps. First, college coaches and college athletic directors are upset that superstar high school players are bypassing college for the NBA, thereby weakening college basketball's talent pool and diminishing the quality of play.²⁴⁴ For instance, as Big East Commissioner Mike Tranghese complains, "The extraction of these kids makes good [college] teams unable to be great."²⁴⁵ Likewise, UCLA head coach Ben Howland observes, "There's less marquee players in college basketball [than twenty years earlier]."²⁴⁶

Second, college basketball offers an attractive viewing option for many sports fans, thereby stimulating demand for its television broadcasts. To contextualize this demand, we can contrast it with fan interest in college hockey. This comparison is particularly useful since star high school hockey players occasionally ascend directly to the National Hockey League ("NHL").²⁴⁷ By a wide margin, college hockey does not generate the television ratings of college basketball.²⁴⁸ Perhaps not coincidentally, the NHL, unlike the NBA, has not openly expressed concern about high school players joining its league right out of high school.²⁴⁹ The NBA, however, cannot ignore the fact that from 2003–2014, CBS will pay the NCAA an average of \$564 million per year (or \$6 billion

²⁴³ This number reflects a 4% commission of \$367,000 (the minimum NBA salary for the 2003–04 season).

²⁴⁴ Kravitz, *supra* note 241.

²⁴⁵ Axelrod, *supra* note 70.

²⁴⁶ *Id.*

²⁴⁷ For example, Alexander Daige went directly from high school to the NHL. Lightning Releases Former Top NHL Pick, Milwaukee J. Sentinel, Sept. 29, 1999, § Sports, at 2. Other players graduate from high school and play minor league hockey instead of college hockey or the NHL.

²⁴⁸ ESPN's coverage of the 2002 NCAA Division I Men's Hockey Championship posted a 1.04 Nielsen rating—a college hockey record for the network. Jim Carlisle, Augusta Gets Longer, So Does CBS, Scripps Howard News Service, Apr. 12, 2002. In contrast, during the 2002 March Madness, CBS posted a 6.4 Nielsen rating. Andrew Grossman, *Tourney Ratings Puzzle CBS Brass*, Hollywood Reporter, Mar. 26, 2002.

²⁴⁹ A search did not yield any comments from NHL representatives even mentioning this issue, let alone opining on it.

total) to broadcast "March Madness," the NCAA's marquee college basketball tournament.²⁵⁰ Nor can the NBA ignore the fact that as high school players bypass college (and as college underclassmen declare for the NBA Draft), less talented players populate college basketball. As a result, college basketball features fewer superstar players, thereby generating less fan interest.²⁵¹ In fact, experts conclude that the lack of star power in college basketball has made it difficult for CBS to market March Madness.²⁵²

Television ratings confirm this trend. Although ratings for March Madness improved slightly between 2000 and 2002, a sharp decline between 1998 and 2000 prompted advertisers to question their return on investment.²⁵³ Likewise, interest in watching the NCAA's championship game—the climax of March Madness—has waned, as the game attracted only 43.5 million viewers in 2002, compared with 46 million in 1997.²⁵⁴ Significantly, poor ratings impairs CBS' ability to recoup its investment in March Madness with advertising revenue.²⁵⁵ Should television ratings for March Madness continue to disappoint, CBS will likely suffer an enormous financial loss: A recent Morgan Stanley study projected that CBS will lose between \$1.2 billion to \$1.3 billion from 2000-06.²⁵⁶ Perhaps it is not surprising then that representatives of CBS, like a number of college coaches, have openly criticized the NBA for failing to boycott high school players. Most notably, Billy Packer, CBS' lead commentator for March Madness, believes that the ascension of younger players to the NBA has both, "destroyed the NBA," and "hurt seventh- or eighth-grade kids who think the minute they can dunk they are ready to go pro . . . instead of working on their games and paying attention to their teachers, the focus is completely in the

²⁵⁰ Richard Sandomir, Sports Media, N.Y. Times, Mar. 29, 2002, § D, at 4.

²⁵¹ The ratings for the 2000 March Madness were the lowest ever, and advertisers reacted negatively. Becky Ycrak, NCAA Ads Losing Appeal, Chi.-Sun Times, Mar. 21, 2001, at 48. On the other hand, the 2002 March Madness were up 2% from 2001. Grossman, *supra* note 248. Likewise, ratings for the 2001 March Madness were up 3% from 2000. Rick Kissell, Hoops Get Assist from "Survivor," Variety, at 48.

²⁵² For instance, Tracy Schoenadel, ESPN Sports Poll Executive Director, makes this point. *Id.*; see also David Dukcevic, Wither College Hoops?, Forbes.com, March 31, 2003, available at http://www.forbes.com/2003/03/31/cx_dd_031Ncaa_print.html.

²⁵³ See *infra* note 248. Note: Ratings for the 2003 March Madness were down over 20% from 2002, although it is impossible to quantify the effect that the war in Iraq had on those ratings. See Dukcevic, *supra* note 252. Therefore, we exclude this year's tournament from the analysis.

²⁵⁴ See Dukcevic, *supra* note 252.

²⁵⁵ Gail Shister, War Could Disrupt Coverage of Oscars, NCAA Tourney, Knight/Ridder Tribune Newspapers, March 18, 2003, available at <http://216.47.179.40/advocate/advocate2/2003/march/03182003Health&Fitness.pC6.pdf>.

²⁵⁶ Walker, *supra* note 202.

wrong direction.”²⁵⁷

Third, Division I schools, as well as the conferences in which they play, receive enormous revenue from the television broadcasting of their men's basketball games. It is estimated that the NCAA distributes approximately 30% of tournament revenue to the schools which participate in the tournament, with a similar revenue proportion distributed to 31 athletic conferences that send teams to the tournament.²⁵⁸ From the 2003 tournament alone, \$235 million was paid to the 31 conferences, which in turn distributed those earnings to individual schools.²⁵⁹ The amount of tournament revenue will increase over time, as the recent \$6 billion television contract between CBS and the NCAA enlarges distributions by 30% in 2003, with 8% annual increases through 2013.²⁶⁰

Many colleges and universities rely on their men's basketball programs in order to fund their other sports programs. To illustrate this point: Michigan State University's athletic department depends on its men's basketball team to generate revenues accounting for at least 20% of the department's \$43 million budget.²⁶¹ March Madness alone provides Michigan State University over \$2 million a year, which covers the combined costs of the University's other men's sports teams, such as baseball, cross country, golf, soccer, swimming, tennis, track, and wrestling.²⁶²

Equally significant, most schools have lucrative contracts and arrangements with private industries that supplement their earnings from the NCAA tournament. Most notably, schools often enter into multiyear, multimillion dollar endorsement contracts with popular shoe companies, such as Nike or Reebok, and they receive significant revenue from merchandise sales and arena signage as well. To illustrate this point: Duke University sold nearly \$40 million worth of souvenirs shortly after its men's basketball team won the NCAA tournament in 1991 and 1992.²⁶³

Furthermore, because schools receive substantial media attention for their participation in March Madness, they often obtain indirect, though highly

²⁵⁷ Judd Zulgad, *There's Trouble Ahead, Packer Said*, *Star Trib.* (Minneapolis, MN), Mar. 30, 2001, at 35N.

²⁵⁸ Lewis Poole, *College Basketball: The Evolution of the Student Athlete*, Towson University Publications, available at <http://tiger.towson.edu/users/lpoole1/cbk1.htm> (last visited Oct. 10, 2003).

²⁵⁹ *Id.*

²⁶⁰ *Cash for Grabs, Green and White*, March 9, 2003, available at http://www.greenandwhite.com/mens_basketball/030309_ncaa_1-8a.html.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ David C. Netzley, III, *Endorsements for Student-Athletes: A Novel Approach to a Controversial Idea*, *Stetson Law Forum*, Fall 1997, at <http://www.law.stetson.edu/lawforum/back/fall97/netzley.htm>.

valuable benefits, such as increased student applications and enlarged alumni donations. For instance, after the University of Rhode Island's men's basketball team unexpectedly made it to the "Elite Eight" in the 1998 NCAA Tournament, applications for undergraduate admissions – especially out-of-state applications – increased for the first time in 10 years, which school officials attributed to national television exposure.²⁶⁴ Similarly, Michigan State University, after winning the NCAA Tournament in 2000, saw a record number of students apply later that year. Michigan State admissions director Gordon Stanley confirmed the enduring value of national television exposure: "[The championship] opened up a window for us so students could see the positive things going on in our campus. Success in athletics doesn't influence [high school] student's final decisions, but it put us in the ballpark ... and helped put us on the map."²⁶⁵

Like student applications, alumni donations often grow following a school's success in March Madness. Take the University of Connecticut, which observed a remarkable two-year, 300% increase in alumni donations following the post-season success of their men's and women's basketball teams in the late 1990s.²⁶⁶ This trend certainly caught the eye of school officials, such as Edward T. Allenby, president of the University of Connecticut Foundation, who noted, "There's no doubt that sports can play a significant role in helping raise money for a university."²⁶⁷

College coaches have likewise benefited from television visibility and March Madness. Some popular coaches, such as Duke University's Mike Krzyzewski and Oklahoma State University's Eddie Sutton, have wisely capitalized on the marketability of college basketball and their teams' success. Krzyzewski, for instance, signed a \$6.6 million, 16-year endorsement contract with Nike.²⁶⁸ Even less notable college basketball coaches can earn well over well \$100,000 annually for endorsing athletic footwear, as shoe companies desire not only traditional marketing visibility, but also influence with marquee college basketball players in hopes of eventually signing those players to shoe contracts when they turn pro.²⁶⁹

²⁶⁴ Robert Lee, *Basketball Success May Attract More Students to URI*, *The Source*, available at <http://www.uri.edu/artsci/jor/TheSource/Basketball.htm> (last visited Oct. 9, 2003).

²⁶⁵ Jay Parsons, *Basketball Success May Deepen Applicant Pool*, *The Diamondback*, Apr. 5, 2001, available at <http://www.inform.umd.edu/News/Diamondback/01-04-05/news3.html>.

²⁶⁶ Jonathan V. Last, *Hoop Dreams in the Development Office*, *Philanthropy Roundtable*, March/April 2002 Issue, available at <http://www.philanthropyroundtable.org/magazines/2000-03/last.html>.

²⁶⁷ *Id.*

²⁶⁸ *Bank Shots*, *Village Voice*, March 22, 2000, available at <http://www.villagevoice.com/issues/0012/jockbeat.php>.

²⁶⁹ See Netzley, *supra* note 263.

Ironically, college basketball players—the group actually generating this vast revenue—are precluded from sharing in the fruits of their labor. Indeed, NCAA amateurism rules only allow athletes to receive tuition, room, board, and books from their universities.²⁷⁰ Though college basketball players attract fans to watch games and purchase merchandise, the NCCA prohibits them from receiving any portion of the revenue that they generate. Perhaps paradoxically, the NCAA contends that by preventing college basketball players from benefiting from their labor, it “protects them from exploitation by professional and commercial enterprises.”²⁷¹

²⁷⁰ NCAA Bylaws, art. 15.2.5.1; see generally Netzley, *supra* note 263.

²⁷¹ NCAA Const., art. 2.8; see generally Orion Riggs, *The Façade of Amateurism: The Inequities of Major College Athletics*, 6 Kan. J. L. & Pub. Pol’y 137 (1996).

TABLE 18: THE FINANCIAL WINNERS AND LOSERS OF MARCH MADNESS

ENTITY	\$\$ WINNER \$\$	\$\$ LOSER \$\$
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA)	From 2003-14, it will receive \$6 billion from CBS for the television rights to March Madness	
COMMERCIAL INTERESTS	CBS, ESPN, advertisers, and myriad merchants and distributors profit considerably from March Madness	
COLLEGE ATHLETIC DEPARTMENTS	Many rely heavily on revenue from NCAA tournament to fund their less marketable teams	
COLLEGE ADMISSIONS OFFICES	Often see increased applications after successful NCAA entry	
COLLEGE DEVELOPMENT OFFICES	Often see increased alumni donations after successful NCAA entry	
COLLEGE COACHES	Many secure lucrative personal endorsement contracts when their teams generate fan interest	
COLLEGE BASKETBALL PLAYERS		Receive no compensation, even though they create the product which fans watch and buy merchandise for
SUPERSTAR COLLEGE BASKETBALL PLAYERS		Suffer two additional costs: (1) opportunity cost of not earning NBA salary; and (2) shrinking NBA career earnings curve

In short, a ban on high school basketball players would mean that March Madness would feature Tyson Chandler or LeBron James or other dynamic young talents. Such a reason, of course, is for the benefit of the NCAA, its participating schools, coaches, and commercial interests—and not Tyson Chandler or LeBron James, who, as amateurs, would not have earned a dollar of the revenue generated by their excellence on the court. For this very reason, Dallas Mavericks owner Mark Cuban prefers that college basketball players play instead in minor leagues or abroad, because “that would take a lot of the hypocrisy out of it.”²⁷²

III. OVERVIEW OF RELEVANT LABOR & ANTITRUST LAW ON GROUP BOYCOTTS

There are two scenarios whereby high school basketball players could lose their capacity to declare for the NBA Draft. First, the NBA and the NBPA could collectively bargain to ban these players. In all likelihood, this rule would be created during the next labor-management negotiations, which are likely to begin within a year, as the existing CBA is set to expire after the 2004-2005 season. Plausibly, the NBA and NBPA could agree to this rule at an earlier time, though because it would represent an important concession by the NBPA, it would far more likely occur during the labor-management negotiations as an offset to a corresponding players’ “gain.” Importantly, however, the NBPA has consistently pledged to refuse to sign any proposed CBA containing this rule. Moreover, even if the NBPA accepts a ban as part of a proposed CBA, high school players could then seek to persuade a majority of NBPA members to decertify the NBPA, thus removing its bargaining power.

Alternatively, high school players could lose their capacity to declare for the NBA Draft if the NBA unilaterally banned their entrance. This is the undoubtedly more controversial setting, as a high school player could allege that he and his fellow superstar high school basketball players are boycotted by the rule. As we will discuss, if high school players bring suit, a court could employ either *per se* or rule of reason analysis to determine whether they have been illegally boycotted.

The next Section provides an overview of the legal principles invoked by these two scenarios.

A. The Labor Exemption, Collective Bargaining & Decertification

In our first scenario, the NBA and NBPA would agree to ban high school players from the NBA Draft. In this circumstance, high school players would want to explore the limits of collective bargaining, and whether the NBPA

²⁷² See Dukceovich, *supra* note 252.

exceeded its bargaining capacity by agreeing to ban them. As a result, high school players would turn to federal labor law.

The Sherman Act of 1890²⁷³ sought, among other purposes, to protect the individual right to contract.²⁷⁴ Unions, however, are combinations of individuals that seek to preclude an employer from negotiating with individual employees.²⁷⁵ To enable unions to overcome the purview of the Sherman Act, Congress first enacted the Clayton Act of 1914²⁷⁶ and later the Norris-Laguardia Act of 1932²⁷⁷ and the National Labor Relations Act of 1935²⁷⁸ ("NLRA"). Collectively, these legislative acts create a labor exemption from antitrust laws.²⁷⁹

More specifically, Congress used section 6 of the Clayton Act to declare that antitrust laws do not prohibit unions.²⁸⁰ Having established that labor unions are entitled to represent employees, Congress later passed the Norris-Laguardia Act to announce a federal policy that favors the organization of labor.²⁸¹ Finally, through the NLRA, Congress advocated the use of collective bargaining to resolve labor-management disputes.²⁸² In effect, federal labor policy reflects a belief that employees are better off negotiating together than individually, particularly when negotiating wages, hours, and other working conditions.²⁸³

²⁷³ 15 U.S.C.S. § 17 (2002).

²⁷⁴ *Id.* See also *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (illustrating application of Sherman Act to the individual right to contract).

²⁷⁵ Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 *Colum. L. Rev.* 1045, 1048 (1994).

²⁷⁶ 15 U.S.C. § 12-37 (2002).

²⁷⁷ 29 U.S.C. § 101-115 (2002).

²⁷⁸ 29 U.S.C. § 151-169 (2002).

²⁷⁹ See *e.g.*, *Mackey v. NFL*, 543 F.2d 606, 609 (8th Cir. 1976) (describing the purpose of the labor exemption). Although Congress has explicitly endorsed collective bargaining as a desirable means to negotiate employment conditions, the results of bargaining sessions have not always received the same approval by the Supreme Court. *United Mine Workers v. Pennington*, 381 U.S. 657, 667 (1965) (holding that collective bargaining agreement will not automatically obtain protection from antitrust law). Rather, an agreement will only receive protection if it does not substantially affect market conditions. *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100* 421 U.S. 616 (1975). For instance, a collective bargaining agreement can not require that employers raise prices in order to raise salaries for employees. *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.* 381 U.S. 676, 692 (1965). In the event it receives protection, a collective bargaining agreement has obtained what is often called the "nonstatutory" labor exemption. *Connell*, 421 U.S. at 622.

²⁸⁰ See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921) (holding that that section 6 should be interpreted as meaning only that antitrust laws do not prohibit unions from "lawfully carrying out their legitimate objects").

²⁸¹ See 29 U.S.C. § 102 (2002).

²⁸² See *Id.* § 151. For a description of NLRA, see Michael J. Cozzillio & Mark S. Levinstein, *Sports Law* 350 (1997).

²⁸³ See, *e.g.*, *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

In negotiating with employers, union members are to select their representatives. As stipulated by the NLRA, union representatives, provided they have been voted in by a majority of union members, become the “exclusive representatives of all the employees in such unit for the purposes of collective bargaining.”²⁸⁴ Indeed, union representatives are entrusted with “harmonizing and adjusting the conflicting interests of employees within the bargaining unit, no matter how diverse their skills, experience, age, race or economic level.”²⁸⁵ Significantly, once union representatives have been selected, individual employees are prohibited from negotiating individually, absent the union’s consent.²⁸⁶

Although federal labor law encourages collective bargaining as a tool for employees to maximize their employment conditions, the Supreme Court has recognized that “the complete satisfaction of all who are represented is hardly to be expected.”²⁸⁷ Not surprisingly, the “losers” in collective bargaining are often the junior members of an organization, in part a result of the Supreme Court’s holding in *Ford Motor Co. v. Huffman*,²⁸⁸ where it affirmed that a collective bargaining agreement may require salaries and other benefits to be allocated by seniority.²⁸⁹

Prospective employees are usually even more disadvantaged by collective bargaining than are junior employees, since those not yet hired are nearly devoid of suasion on the labor-management negotiations. Despite the disadvantaged position of prospective employees, courts have repeatedly allowed collective bargaining to adversely affect their prospective employment conditions.²⁹⁰ In

²⁸⁴ 29 U.S.C. §§ 157, 159(a).

²⁸⁵ R. Gorman, *Labor Law* 631 (1976).

²⁸⁶ *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). For an illuminating account of the use of collective bargaining in professional sports, see Michael S. Jacobs & Ralph Winter, *Antitrust Principles and Collective Bargaining: Of Superstars in Peonage*, 81 *Yale L. J.* 1 (1971).

²⁸⁷ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); see also *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180 (reaffirming that collective bargaining may adversely affect some individuals in the bargaining unit).

²⁸⁸ *Id.* at 338.

²⁸⁹ *Id.* at 337–39.

²⁹⁰ See e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944) (when an employee is hired after consummation of a collective bargaining agreement, “the terms of [his] employment already have been traded out”); *NLRB v. Laney and Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966) (“the duty to bargain is a continuing one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future”); *Wood v. NBA*, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff’d*, 809 F.2d 954, 959–62 (2d Cir. 1987) (noting that newcomers in the industrial context routinely find themselves disadvantaged in relation to those already hired).

fact, courts have found that the term “employee” shall include prospective employees and job applicants, thereby including these individuals in the “collective bargaining unit.”²⁹¹ Moreover, financial opportunities for prospective entrants to professional sports leagues are routinely used in collective bargaining. For a recent example, take the National Hockey League Players’ Association, which, in an effort to reach a new collective bargaining agreement with National Hockey League team owners and avert a league-wide lockout, have offered to reduce entry-level salaries by nearly one-third.²⁹²

On the other hand, prospective employees—and especially prospective professional athletes—may find encouragement in *Clarett v. National Football League*,²⁹³ a decision rendered by the U.S. District Court for the Southern District of New York in February 2004 and is currently on appeal.²⁹⁴ In *Clarett*, Ohio State sophomore Maurice Clarett challenged an NFL rule preventing amateur players from participating in the NFL Draft until the third year anniversary of their high school graduation. In holding for Clarett, Judge Shira A. Scheindlin reasoned that NFL players are only bound by previously bargained terms because they “step into the shoes of players who did engage in collective bargaining”; in contrast, amateur players who are categorically denied eligibility for employment in the NFL cannot be bound by terms of unobtainable employment, even if only temporarily unobtainable.²⁹⁵ Since the NFL rule

²⁹¹ See e.g., *Reliance Ins. Cos. v. NLRB*, 415 F.2d 1,6 (8th Cir. 1969) (holding that job applicants are “employees” within meaning of 29 U.S.C. § 152(3)); *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96, 99 (7th Cir. 1959) (same); *John Hancock Mut. Life Ins. Co. v. NLRB*, 89 U.S. App. D.C. 261, 191 F.2d 483, 485 (D.C. Cir. 1951). Indeed, 29 U.S.C. § (3) n.3 notes that the National Labor Relations Act includes workers outside the bargaining unit as “employees.”

²⁹² See Kevin Paul Dupont, *So Far, No Bargain at All*, *Boston Globe*, Nov. 9, 2003, at C9.

²⁹³ 2004 U.S. Dist. LEXIS 1396 (S.D.N.Y. Feb. 5, 2004). This decision is also available at <http://www.sskrplaw.com/nfl/clarettopinion.pdf> (last visited Feb. 6, 2004).

²⁹⁴ *NFL Plans to Appeal Ruling*, *ESPN.com*, Feb. 5, 2004, at <http://sports.espn.go.com/nfl/news/story?id=1727856>.

²⁹⁵ 2004 U.S. Dist. LEXIS, at *47. At first glance, the notion that Clarett cannot be bound by collectively-bargained terms because he is not yet a draft pick or player appears to be an unprecedented proposition, thus making it a likely target on appeal. However, the only player *discernibly* affected by the inclusion of Clarett in the 2004 NFL Draft would be the very last player selected in the Draft, who effectively gets “bumped” out. That is, whether or not Clarett is in the Draft, the same number of amateur players will be picked; conceptually, his inclusion would only affect the identity and aggregate talent of those amateur players, none of whom are members of either the NFL’s or the NFLPA’s bargaining unit. The U.S. Court of Appeals for the Second Circuit may consider this factor when contemplating whether the rule should obtain protection from the labor exemption. As an alternative rationale, however, Judge Scheindlin held that the NFLPA was not adequately involved in the creation of the rule, thus equating it with a unilaterally-imposed rule by the NFL and subject to antitrust laws. *Id.* at *47–48. Therefore, even if on appeal the Second Circuit

affected such amateur players—and only such players—it was scrutinized under antitrust law and deemed an illegal group boycott.²⁹⁶ If upheld, *Clarett* would suggest that while professional sports leagues and their players' associations may collectively bargain certain aspects of prospective players' employment (e.g., salary and hours), they may not bargain to exclude those players. Until the appeal is heard, however, the consequential effect of *Clarett* remains uncertain.²⁹⁷

As a general matter, while seniority often dictates the path of a union's collective bargaining, union representatives must maintain a majority support of their constituency. Otherwise, those representatives risk the prospect of decertification, where a majority of union members vote to revoke the certification of the union.²⁹⁸ Should a decertification occur, the representatives of a decertified union no longer represent the employees that had comprised the union.²⁹⁹ Instead, these employees can either negotiate individually or vote for a new union.³⁰⁰ Courts have justified the decertification process as a method to promote employee free choice.³⁰¹

In the context of professional sports, courts have found that once a players' association has been decertified, previously bargained employment conditions lose the protection of the federal labor exemption and thus become subject to antitrust laws. In *Powell v. National Football League*,³⁰² eight individuals who played in the NFL brought an antitrust suit against the league, alleging that the provisions of the CBA between the NFL and the National Football League Players' Association ("NFLPA") violated antitrust laws.³⁰³ Importantly, even

holds, in dicta, that the rule would have been valid had it been collectively-bargained, it can also hold that such collective-bargaining never occurred and the rule constituted a unilaterally-imposed group boycott.

²⁹⁶ *Id.* at *93.

²⁹⁷ See *supra*, note 295.

²⁹⁸ See e.g., *NLRB v. Americare-New Lexington Health Care Ctr.*, 124 F.3d 753, 758 (6th Cir. 1997) (stipulating that the preferred method of determining whether a union has majority support is a secret-ballot election).

²⁹⁹ 29 U.S.C. § 159; see also *Int'l Union, United Auto., etc. v. Telex Computer Product*, 816 F.2d 519, 521 (10th Cir. 1987) (describing vote to decertify); *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 284 (U.S. 1972) (holding that if a new union is approved by a majority of employees, and it receives certification by the National Labor Relations Board, the new union is not bound by a CBA that had been negotiated by the decertified union).

³⁰⁰ *Vic Koenig Chevrolet v. NLRB*, 126 F.3d 947, 951 (7th Cir. 1997).

³⁰¹ See e.g., *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1254 (3rd Cir. 1991); *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enfd sub nom.*, *Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir.), *cert. denied*, 488 U.S. 889 (1988).

³⁰² 764 F. Supp. 1351 (D. Minn. 1991).

³⁰³ *Id.* at 1353–54.

though the CBA had expired before decertification, the players were only able to succeed with an antitrust suit *after* the NFLPA was decertified. Indeed, in a previous suit,³⁰⁴ the U.S. Court of Appeals for the Eighth Circuit held that an expired CBA between the NFL and NFLPA remained in effect indefinitely, even if in negotiating a new CBA, the NFL and NFLPA were to reach an "impasse," or break off negotiations.³⁰⁵ Only in *Powell*, where decertification signified a termination of the collective bargaining relationship, could NFL players succeed in an antitrust suit.

Taking advantage of *Powell* and an NFLPA that remained decertified for six years,³⁰⁶ two other sets of NFL players used antitrust law to challenge restraints on player movement. In *Jackson v. National Football League*³⁰⁷ four NFL players succeeded in becoming unrestricted free agents by using antitrust law to challenge a rule that had been negotiated by the NFLPA and the NFL.³⁰⁸ Similarly opportunistic, in *White v. National Football League*,³⁰⁹ a group of NFL players brought suit seeking to be declared unrestricted free agents.³¹⁰

Of particular relevance to this analysis, *Powell* was embodied in *National Basketball Association v. Williams*,³¹¹ which dealt with the previously discussed NBA labor strife of 1994.³¹² Briefly, the 1988 CBA between the NBA and NBPA had expired in 1994, and the two sides were unable to agree on a new CBA for almost a year.³¹³ During this time, a group of NBPA members brought suit, alleging that because the 1988 CBA had expired, it no longer received the protection of the labor exemption.³¹⁴ The U.S. District Court for the Southern District of New York disagreed, holding that antitrust immunity remained in effect so long as a collective bargaining relationship existed.³¹⁵ Although it held for the NBA, the court suggested that the NBA's players could follow the *Powell* strategy and decertify the NBPA as its collective bargaining agents, thus

³⁰⁴ *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991).

³⁰⁵ *Id.* at 1304.

³⁰⁶ The NFL and its players could not agree to a new CBA in 1993 until the players re-certified the NFLPA. *Pro Football*, *Hous. Chron.*, June 30 1993, at 8.

³⁰⁷ 802 F. Supp. 226 (D. Minn. 1992).

³⁰⁸ *Id.* at 235.

³⁰⁹ 822 F. Supp. 1389 (D. Minn. 1993).

³¹⁰ *Id.* at 1395. This case was settled as part of the 1993 CBA. For a detailed review of this settlement, see Corcoran, *supra* note 275, at 1065.

³¹¹ 857 F. Supp. 1069 (S.D.N.Y. 1994).

³¹² See *supra*.

³¹³ 857 F. Supp. at 1072.

³¹⁴ *Id.* at 1073.

³¹⁵ *Id.* at 1077.

removing its capacity to collectively bargain with the NBA.³¹⁶

Correspondingly, if the 1999 CBA between the NBA and NBPA were to expire, and during subsequent negotiations, the NBA and the NBPA's union representatives were to agree to ban high school players, high school players could seek to convince a majority of NBPA members to decertify, thereby removing the NBPA's collective bargaining power. At that point, a ban on high school players may fall under the scrutiny of antitrust laws.³¹⁷ This Article will explore the legal and practical viability of this tactic in Part IV.

B. Antitrust Law & Group Boycotts

In the second setting, the NBA would unilaterally impose a rule banning players from entering the NBA Draft until they completed one year of college basketball, or fulfilled some other obligation that precluded them from joining an NBA team following high school graduation. To demonstrate that the rule violated the law, a high school player would likely need to prove that the NBA and its teams were committing a group boycott, or a "concerted refusal to deal" with high school players.³¹⁸ As a result, the players would invoke antitrust laws to gain entrance into the NBA, since group boycotts prevent the boycotted party from dealing in an open market.³¹⁹

Specifically, a group boycott would invoke Section 1 of the Sherman Antitrust Act, since Section 1 requires concerted action by more than one economic entity. In order to prevail in a Section 1 claim, the plaintiff must first demonstrate that an agreement exists between more than one economic entity, and that it unreasonably restrains competition.³²⁰ According to the Supreme Court, an agreement shall be evident when there is "a unity of purpose or a

³¹⁶ Id. at 1078 (stating that while the court was holding for the NBA, "this does not mean the Players are 'stuck' with these provisions forever").

³¹⁷ Such a conclusion would be impacted by the disposition of the *Clarett* appeal.

³¹⁸ See E. Thomas Sullivan and Jeffrey L. Harrison, *Understanding Antitrust and its Economic Implications* 255 (1998) (noting that the terms 'boycott' and 'concerted refusal to deal' are often used interchangeably).

³¹⁹ See e.g., *Bogan v. Hodgkins*, 166 F.3d 515 (2nd Cir. 1998), cert denied, 120 S. Ct. 526 (1999) citing *Smith v. Pro Football, Inc.*, 193 U.S. App. D.C. 19, 593 F.2d 1173, 1178 (D.C. Cir. 1978) (identifying the "classic model of a group boycott" to be "a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level").

³²⁰ See e.g., *Standard Oil of N.J. v. United States*, 221 U.S. 1 (1911) (noting that Section 1 prohibits only those agreements that unreasonably restrain trade); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (finding that per se agreements are those "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality"). Id. at 692.

common design and understanding or a meeting of minds in an unlawful arrangement" between at least two separate economic entities.³²¹ Courts have broadly interpreted the meaning of an "agreement" to include oral, tacit, or implied agreements.³²²

When the existence of agreement is confirmed, the next step is to assess whether the agreement is a "vertical" agreement or a "horizontal" agreement. A vertical agreement is one between two different levels of businesses (e.g. players and leagues) while a horizontal agreement is one between business entities on the same level of the market (e.g. team owners and fellow team owners). Generally, courts are wearier of horizontal agreements for they often reduce the degree of competition between competitors or limit the opportunities for "outside" entities to participate in the market.³²³ As a result, horizontal agreements are more likely to restrain trade unreasonably, thereby violating Section 1.³²⁴

Some agreements so clearly restrain competition in an unreasonable manner that they are considered "*per se*" unlawful. Along with particularly egregious group boycotts, other examples of such "*per se*" agreements include price-fixing and horizontal market division.³²⁵ Significantly, *per se* analysis relieves the plaintiff of the burden of proving anticompetitive effects, which are presumed.³²⁶

When an agreement does not so clearly restrain competition in an unreasonable manner, however, courts employ the "rule of reason" to determine the unreasonableness of the agreement. The Supreme Court has articulated a general standard for employing the rule of reason to evaluate contested agreements: "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reason why it was imposed."³²⁷ As a result, not all cooperative agreements are

³²¹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

³²² See e.g., *Spence v. Southwestern Alaska Pilots' Ass'n*, 789 F. Supp. 1014, 1022 (D. Alaska 1992) (oral agreement); *Winter Hill Frozen Foods & Services, Inc. v. Haagen-Dazs, Inc.*, 691 F. Supp. 539 (D. Mass. 1988) (tacit or implied agreement).

³²³ See e.g., *Nat'l Collegiate Athletic Assoc. v. Bd. of Regents*, 468 U.S. 85, 99, 106 (1984) (finding that because a horizontal agreement between an athletic association and a network placed a ceiling on the number of games member institutions may televise, it placed an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output).

³²⁴ *Id.*

³²⁵ See e.g., *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332 (1982) (price fixing); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) (horizontal market division); *Northwest Stationers v. Pacific Stationary Printing Co.*, 472 U.S. 85 (1985) (group boycotts).

³²⁶ *Rebel Oil Co., Inc. v. Atlantic Richfield*, 51 F.3d 1421, 1443 (9th Cir.), cert. denied, 116 S. Ct. 815 (1995).

³²⁷ *National Society of Professional Engineers*, 435 U.S. at 692.

found to violate Section 1; indeed, some are even found to bolster competition.³²⁸

Under rule of reason analysis, a plaintiff must exhibit three factors to prove the existence of an illegal group boycott: a) distinct business entities entered into a horizontal agreement; b) the agreement adversely affected competition in the relevant market; and c) either the anticompetitive effects of the agreement exceeded its procompetitive effects or the businesses could have employed less restrictive ways to obtain the same procompetitive effects.³²⁹

Aside from demonstrating the existence of a horizontal agreement, rule of reason analysis requires the plaintiff to prove that the group boycott adversely affects competition in the relevant market. This requirement contains two parts. First, the plaintiff must define the “relevant” market within which the alleged anticompetitive effects will be assessed. Generally, courts identify two components of a relevant market: the product market and the geographic market. The product market is composed of products that are reasonably suitable from the point of view of buyers.³³⁰ In the context of professional sports, players are viewed as the sellers, in that they are selling their talents (the “product”), while the teams are viewed as the buyers. In contrast, the geographic market is composed of all suppliers of a product that can offer the product to the same buyers.³³¹ Broadly speaking, the Supreme Court has identified a group boycott’s relevant geographic market as, “the market in which the seller operates and to which the purchaser can practically turn for supplies.”³³² Most relevantly to this analysis, courts have excluded from a geographic market those potential sellers (players) whose product is not considered a suitable alternative to the defendant’s customers (fans).³³³

Equally significant, a group of plaintiffs must allege not only injury to the group, but also either injury to competition or, more generally, a defined relevant market in which such injury occurred.³³⁴ In other words, rule of reason analysis

³²⁸ See, e.g., *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979) (noting that cooperative practices are acceptable if “designed to ‘increase economic efficiency and render markets more, rather than less, competitive’” (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16, (1978)); *Bd. of Trade v. United States*, 246 U.S. 231, 240–41 (1918) (noting that futures trading created a public market for grain arrivals).

³²⁹ *Id.*

³³⁰ *Sullivan & Harrison*, *supra* note 318, at 30.

³³¹ *Id.* at 31.

³³² *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1960).

³³³ *Sullivan & Harrison*, *supra* note 318, at 370 citing *United States v. Mercy Health Services*, 902 F. Supp. 968, 975 (N.D. Iowa 1995).

³³⁴ *Five Smiths, Inc. v. Nat’l Football League Players Ass’n*, 788 F. Supp. 1042, 1052–53 (D. Minn. 1992) citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (holding in a Rule of Reason claim, that the plaintiff must allege not only an injury to himself, but an injury to the

requires the plaintiffs to prove that the group boycott produces an "anticompetitive effect on the market as a whole," not just unfair treatment to the individual plaintiffs.³³⁵ To show that a requisite number of parties have been harmed by the boycott, the plaintiffs must demonstrate that the boycotting firms possess "market power," which the Supreme Court has defined as "the power to control prices or exclude competition."³³⁶ Practically, the purported boycott must affect a requisite number of competing sellers and must result from an agreement of boycotting parties that have significant influence on the market. Otherwise, the boycott may not be within the scope of antitrust law. As we will explore later, if a ban on high school players affects only a small percentage of the NBA's talent pool, it is possible that such a rule would not constitute a group boycott.

As a final step, rule of reason analysis requires a two-part balancing test. First, courts must weigh whether the alleged group boycott produces more procompetitive benefits than anticompetitive effects. If the alleged boycott is found to stimulate competition more so than it discourages it, courts must then determine whether those same procompetitive benefits can be obtained without causing the anticompetitive effects.³³⁷ As a result, not every cooperative agreement that produces anticompetitive effects violates antitrust law under rule of reason analysis.³³⁸

Whether it receives *per se* or rule of reason treatment, a "boycott" of high school players from the NBA Draft would illustrate an "industry self-regulatory scheme," which is a particular type of group boycott. Typically, an industry self-regulatory scheme involves an association of businesses – a "horizontal axis" – that has created rules which preclude either access to its association or in some way disadvantages those parties outside the association. For the most part, group boycotts relating to industry self-regulatory schemes are considered *per se* illegal.³³⁹

At the same time, however, courts have increasingly abandoned *per se*

market as well).

³³⁵ Caremark Homecare, Inc. v. New England Critical Care, Inc., 700 F. Supp. 1033, 1036 (D. Minn. 1988).

³³⁶ United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391–92 (1956).

³³⁷ Tarabishi v. McAlester Reg'l Hosp. 951 F.2d 1558, 1570 (10th Cir. 1991).

³³⁸ See, e.g., Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 20, 60 (1979) (noting that cooperative practices are acceptable if designed to increase economic efficiency); Board of Trade v. United States, 246 U.S. 231, 240–41, (1918) (noting that futures trading created a public market for grain arrivals).

³³⁹ See, e.g., Radiant Burners, Inc. v. People's Gas, Light & Coke Co., 364 U.S. 656, 659–680 (1961); Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457 (1941).

treatment of industry self-regulating schemes, instead employing rule of reason analysis or quasi-rule of reason analysis. To demonstrate this phenomenon, we begin with a discussion of the Supreme Court's landmark ruling in *Silver v. New York Stock Exchange*,³⁴⁰ where it attempted to identify the contours of appropriate *per se* analysis.

In *Silver*, the Court determined that the New York Stock Exchange ("NYSE") violated Section 1 of the Sherman Act by denying a non-member broker-dealer access to the stock ticker service, a service the Court concluded was essential to the non-member broker-dealer to work in the industry. Equally bothersome to the Court, the NYSE failed to provide the broker-dealer notice of the denial, or offer him any explanation for the denial, or afford him an opportunity to contest the denial.³⁴¹ Although the Court recognized that federal security laws entitled NYSE to employ some self-regulation, the absence of procedural safeguards within that self-regulation unduly restrained a non-member's opportunity to work in the industry. In other words, NYSE had employed an absolute ban on non-member entry to their services and had failed to offer a non-member the minimal right to petition for entry. Consequently, its ban constituted a *per se* illegal group boycott.³⁴²

Although *Silver* appeared to endorse *per se* treatment for industry self-regulatory schemes, subsequent cases interpreted *Silver* as carving a narrow, though significant exception, to *per se* analysis. Generally, self-regulatory schemes were deemed legal, even though they injured the plaintiff, when they were

the product of a legislative mandate for self-regulation; consistent with the policy justifying self-regulation, reasonably related to the policy's goal, and no more extensive than necessary; and balanced by procedural safeguards instituted by the association to assure the scheme is not arbitrary.³⁴³

Courts broadly interpreted the *Silver* exception. In fact, courts began to apply the *Silver* exception in ways that appeared more like rule of reason analysis than *per se* treatment. Even when self-regulatory schemes clearly failed to meet the criteria for the *Silver* exception, they were nonetheless deemed acceptable by satisfying the more generous standard of "nondiscriminatory and

³⁴⁰ 373 U.S. 341 (1963).

³⁴¹ *Id.* at 343, 347.

³⁴² *Id.* at 347.

³⁴³ *Denver Rockets v. All-Pro Mgmt. Inc.*, 325 F. Supp. 1049, 1064-65 (D.C. Cal. 1971); see also *Brenner v. WBC*, 675 F.2d at 454-56 (citing *Denver Rockets* approvingly); *Linesman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (same). For a general discussion, see Cozzillio & Levinstein, *supra* note 282, at 265.

. . . instituted for a positive purpose unrelated to the suppression of competition.”³⁴⁴

Following the path that led to an expansion of rule of reason analysis, the Supreme Court used *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*³⁴⁵ to severely limit the *per se* characterization of industry self-regulatory schemes. In this case, the plaintiff was expelled as a member of a cooperative purchasing agency without a Silver due process hearing. In response, the court usurped much of the meaning behind the Silver exception when it declared:

[I]f the challenged concerted activity . . . would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.³⁴⁶

Interestingly, the Court appeared to enunciate a standard whereby *per se* treatment was applicable only to a select number of group boycotts, but in determining the applicability of *per se* treatment in a given case, the Court advocated several tenets of rule of reason: practices deserving *per se* treatment were those “not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.”³⁴⁷ In other words, the *per se* standard would be applicable only if the boycotting party “possesses market power or it has exclusive access to either supply or an essential element so that competition is affected.”³⁴⁸

Northwest Wholesale Stationers has animated courts to employ the tenets of rule of reason analysis when analyzing alleged group boycotts that result from industry self-regulation. For instance, in *FTC v. Indiana Federation of Dentists*,³⁴⁹ the Supreme Court declined to impose *per se* treatment on a group boycott by competing dentists to withhold patient X-rays from insurance

³⁴⁴ Cozzillio and Levinstein, *supra* note 282, at 265, citing Brenner, 675 F.2d at 454–55.

³⁴⁵ 472 U.S. 284, 294 (1985).

³⁴⁶ *Id.* at 293.

³⁴⁷ *Id.* at 294.

³⁴⁸ Sullivan & Harrison, *supra* note 318, at 164. At the same time, the Silver Court acknowledged that it was unable to provide a “bright-line” rule when it stated “exactly what kinds of activity fall within the forbidden category is, however, far from certain.” Silver, 472 U.S. at 290.

³⁴⁹ 476 U.S. 447 (1986).

companies, even though those dentists were found to have market power and offered no efficiency justifications.³⁵⁰ Significantly, the group boycott adversely affected patients by increasing the cost of medical care, but it did not demonstrably benefit the insurance companies' competitors, thus making the group boycott outside the scope of the *Northwest Wholesale Stationers per se* analysis.³⁵¹ Likewise, in *Tarabishi v. McAlester Regional Hospital*,³⁵² because the anticompetitive effects were not considered predominant, the U.S. Court of Appeals for the Tenth Circuit disapproved *per se* treatment for a decision by a peer review committee to deny privileges to a physician.³⁵³ Similarly, in *Bogan v. Hodgkins*,³⁵⁴ the U.S. Court of Appeals for the Second Circuit drew upon *Northwest Wholesale Stationers* when concluding, "where cooperation is inherent in an enterprise, *per se* treatment is not always the appropriate measure of antitrust illegality."³⁵⁵ Finally, even in the rare instances when *per se* analysis applies to a group boycott, the court has likely made inquiries that approach those made in rule of reason analysis.³⁵⁶

Despite its inability to provide an instantly recognizable standard, *Northwest Wholesale Stationers*, by further limiting the significance of procedural due process, clearly widened the scope of cases eligible for rule of reason analysis. As a consequence, group boycotts resulting from industry self-regulation have become more obtainable, since unless the boycotting firms possess a dominant market position, or those firms hold exclusive access to either supply or competition is affected, or, finally, the boycott is aimed at competitors and it does not have an efficiency rationale, the boycott is to be judged under the more

³⁵⁰ *Id.* at 458.

³⁵¹ *Id.* (abandoning *per se* analysis when the purported group boycott lies "in the context of business relationships where the economic impact of certain practices is not immediately obvious" and limiting the significance of "market power" to those firms employing practices that boycott "suppliers or customers in order to discourage them from doing business with a competitor").

³⁵² 951 F.2d 1558 (10th Cir. 1991).

³⁵³ *Id.* at 1570.

³⁵⁴ 166 F.3d 509 (2nd Cir. 1999).

³⁵⁵ *Id.* at 514; see also *Topps Chewing Gum, Inc. v. Major League Baseball Players Ass'n*, 641 F. Supp. 1179, 1186 (S.D.N.Y. 1986) (finding the scope of the *per se* rule against group boycotts is a recognized source of confusion in antitrust law); *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993) (finding that self-regulation by industry proves more available as a result of *Northwest Wholesale Stationers*); *Indiana Fed'n of Dentists*, 476 U.S. at 448 (noting that courts are reluctant to condemn rules adopted by professional associations as unreasonable *per se*).

³⁵⁶ See, e.g., *FTC v. Toys "R" Us, Inc.*, 1998 FTC LEXIS 119 (providing four essential factors for courts to employ before applying *per se* analysis: (1) purposes of disadvantaging competitors, (2) market dominance; (3) terminating access to a necessary supply or relationship; and (4) absence of a business justification).

tolerant and fact-specific rule of reason standard.³⁵⁷

As will be discussed in Part IV, however, *Northwest Wholesale Stationers* did carve out a small category of cases deserving *per se* treatment, including those where the boycotting party has “exclusive access” to the supply. In the case of the NBA, we will later ask whether there are any viable substitutes that can match its ability to attract to potential top basketball players. Moreover, we will discuss whether the NBA possesses a dominant market position in professional basketball, thus potentially supplying another rationale for a court to apply *per se* treatment.

Whether or not the NBA qualifies for *per se* treatment will also depend upon the series of cases following *Northwest Wholesale Stationers* that have identified professional sports leagues as particularly well-suited for rule of reason analysis, for such leagues require a significant amount of self-policing. Simply put, unlike a group of rival car dealers, for instance, professional sports teams within leagues have no interest in eliminating their “competition.”³⁵⁸ In fact, professional sports teams are greatly interdependent, for they need opponents to win games and to stimulate fan interest.³⁵⁹ Likewise, professional sports leagues are distinct from typical business contexts, as teams must agree on game rules, schedules, number of players, and types of permissible equipment.³⁶⁰

As a result of the unique relationship between professional sports teams within a league, courts have preferred to apply rule of reason to alleged group boycotts in this context, and have often allowed a great deal of cooperation between the teams.³⁶¹ For instance, in *Fraser v. Major League Soccer*,³⁶² a court

³⁵⁷ See Daniel E. Lazaroff, *The Influence of Sports Law on American Jurisprudence*, 1 Va. Sports & Ent. L.J. 1, 8 (2001) (noting that the Supreme Court has significantly discarded “bright-line” analysis of group boycotts, instead opting for individualized and “fact-based” analysis that gives greater attention, and perhaps weight, to restraints that “actually enhance economic efficiency and benefit competition”); see also Thomas A. Piraino, Jr., *Reconciling the Per se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685 (1991) (discussing difficulty in determining which approach should apply and arguing that courts should analyze section 1 conduct on a continuum).

³⁵⁸ Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 Ga. L. Rev. 137, 150 (1999).

³⁵⁹ *Id.* See also Jacobs & Winter, *supra* note 286 (discussing the implications of antitrust and labor law on professional sports).

³⁶⁰ *Id.* at 151–52.

³⁶¹ See, e.g., *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1391 (9th Cir. 1984) (noting that sports leagues “do not fit readily into the antitrust context”); *North Am. Soccer League v. NFL*, 670 F.2d 1249, 1253 (2d Cir. 1982) (citing the “interdependence of professional sports league members and the unique nature of their business”).

³⁶² 7 F. Supp. 2d 73 (D. Mass. 1998). Likewise, in *Clarett*, Rule of Reason was applied “in order to take into account the realities of the industry’s regulatory landscape.” See 2004 U.S. Dist. LEXIS 1396, at *75.

applied rule of reason analysis to a restraint on player movement, leading to a characterization of sports teams as part of a "joint venture."³⁶³ Because joint ventures require a certain degree of collaboration between its entities, "some form of cooperation among the teams" was appropriate.³⁶⁴ Along these lines, one commentator argues that in the context of professional sports leagues, courts "generally reject reliance on *per se* principles and almost always require plaintiffs to satisfy the full-blown rule of reason standard."³⁶⁵ More boldly, another commentator posits that virtually any professional league would satisfy the requirement that a boycott is the result of legitimate "self-regulation."³⁶⁶

It is therefore possible that a court will employ *per se* analysis or some, if not all, of the tenets of rule of reason to an allegation that the NBA's desired age requirement constitutes a group boycott. We will explore this broad range of possibilities in Part IV.

IV. APPLICATION OF ECONOMIC AND LEGAL PRINCIPLES TO THE NBA DRAFT

A. Collectively Bargained Rule to Ban High School Players

Although this scenario is improbable, the NBA and the NBPA could agree to ban high school players from the NBA Draft. If such a rule were negotiated, high school players may experience difficulty challenging it, for courts have repeatedly honored the tradeoffs and bargains resulting from collective bargaining. Judicial deference relates primarily to the NLRA, which explicitly authorizes union representatives to serve as the "exclusive" representation for all employees and anoints collective bargaining as a desirable method for employees to resolve management disputes.³⁶⁷ Moreover, once employees have selected their collective bargaining representatives and appointed them as their exclusive representatives, individual employees are barred from negotiating their employment terms.³⁶⁸

Likewise, courts have allowed collective bargaining agreements to adversely affect prospective employees, even when such individuals are bereft of input during negotiations.³⁶⁹ When they declare for the NBA Draft, high school players

³⁶³ *Id.* at 77.

³⁶⁴ *Id.*

³⁶⁵ Lazaroff, *supra* note 358, at 148.

³⁶⁶ Cozzillio and Levinstein, *supra* note 282, at 266.

³⁶⁷ See *infra*.

³⁶⁸ *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

³⁶⁹ See, e.g., *NLRB v. Laney and Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966) (declaring "a union may legitimately bargain over wages and conditions of employment which affect employees who are to be hired in the future").

are not yet members of the NBPA. Instead, these players are applying to gain entrance into the NBA--similar to individuals who submit job applications in other professions. Importantly, job applicants can be constrained by collective bargaining agreements.³⁷⁰ On the other hand, the most recent decision on point, *Clarett v. National Football League*,³⁷¹ suggests that while the NBA and NBPA may collectively bargain certain aspects of prospective players' employment (e.g., salary and hours), they may not bargain to exclude those players.

Beyond unresolved legal principles that await the appeal of *Clarett*, courts have already addressed collective bargaining tradeoffs in the context of the NBA Draft, and have reaffirmed that collective bargaining may dictate the mechanics of the NBA Draft. Specifically, in *Wood v. National Basketball Association*,³⁷² the court largely immunized the NBA Draft from antitrust attack, provided those draft rules result from collective bargaining. Factually, Leon Wood, a much heralded point guard out of California State University at Fullerton, was drafted by the Philadelphia 76ers in the first round of the 1984 NBA Draft. Yet at the time of the 1984 NBA Draft, the 76ers' player payroll was already in excess of the maximum amount permitted by the salary cap, thereby hampering the team's efforts to sign Wood. Although the 76ers informed Wood's agent that it would offer Wood a multi-year, multi-million dollar deal once it traded away some of its expensive players, it could only offer a one year deal worth \$75,000 for the upcoming season.³⁷³ Wood, however, grew impatient with the 76ers' failure to free up space, and he sought a preliminary injunction restraining enforcement of the collective bargaining agreement between the NBA and the NBPA, thus granting him the right to negotiate with other teams. More specifically, Wood regarded the NBA Draft as "an agreement among horizontal competitors, the NBA teams, to eliminate competition for the services of college basketball players [thereby] constitut[ing] a *per se* violation of Section 1 of the Sherman Act."³⁷⁴

For the very simple reason that the NBA Draft was one of the tradeoffs the

³⁷⁰ See e.g., *Reliance Ins. Cos. v. NLRB*, 415 F.2d 1,6 (8th Cir. 1969) (job applicants are "employees" for purposes of collective bargaining); *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180 (reaffirming that collective bargaining may adversely affect some individuals in the bargaining unit).

³⁷¹ 03 Civ. 7441 (SAS) (S.D.N.Y. 2004), available at <http://www.sskrplaw.com/nfl/clarettopinion.pdf>.

³⁷² 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954, 959-62 (2d Cir. 1987).

³⁷³ Importantly, the 1983 collective bargaining agreement required the 76ers to offer a contract in order to retain Wood's exclusive rights, and neither party expected a deal to be reached until the team could create salary cap space. This is the result of the "memorandum of understanding" reached between the NBA and NBPA which, among other provisions, imposed a maximum team salary limitation on teams. *Id.* at 526.

³⁷⁴ *Wood*, 809 F.2d at 958.

NBPA made during its collective bargaining negotiations, the court rejected Wood's plea for an injunction. Calling the collective bargaining agreement "a unique bundle of compromises," the court emphasized that while the NBA Draft reflected "the interests of the employers in stabilizing salary costs and spreading talent among the various teams," the "minimum individual salaries, fringe benefits, minimum aggregate team salaries, and guaranteed revenue sharing reflect the interests of the union in enhancing standard benefits applicable to all players."³⁷⁵ Therefore, a draft rule would not constitute an agreement exclusively among teams – the horizontal competitors – but instead a reflection of bargaining between a labor organization (NBPA) and its members' employers (NBA Teams). In fact, the court reasoned that if Wood were allowed to remove himself from the collectively bargained NBA Draft, "any employee dissatisfied with his salary relative to those of other workers [could] insist upon individual bargaining, contrary to explicit federal labor policy."³⁷⁶

As a secondary argument, Wood contended that the NBA Draft unfairly affected amateur players, or, in labor law terminology, "employees outside the bargaining unit."³⁷⁷ In other words, Wood maintained that it is illegal for the NBA and NBPA to bind amateur players by rules when those players are without representation during the collective bargaining negotiations. The court, however, quickly dismissed Wood's reasoning, for such a situation "is a commonplace consequence of collective agreements. Seniority clauses may thus prevent outsiders from bidding for particular jobs."³⁷⁸ Moreover, according to the court, "the National Labor Relations Act explicitly defines 'employee' in a way that includes workers outside the bargaining unit."³⁷⁹

Instead of expecting courts to defend them from a collectively bargained ban, high school players can take solace in comments made by Billy Hunter, Executive Director of the NBPA. Hunter claims: "We see no reason why a kid should be barred if he has the skill to play in the league. Anybody who can perform should be permitted to come in. And if the owners and administrators of

³⁷⁵ *Id.* at 962.

³⁷⁶ *Id.* at 960.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 960 citing *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210–15 (1964).

³⁷⁹ *Id.* citing 29 U.S.C. § 152(3). n3. Significantly, however, in *Clarett*, Judge Scheindlin distinguished Wood from *Clarett* in noting, "The league provisions addressed in Wood . . . govern the terms by which those who are drafted are employed. The [NFL] Rule, on the other hand, precludes players from entering the labor market altogether, and thus affects wages only in the sense that a player subject to the Rule will earn none. But the Rule itself, for the reasons just discussed, does not concern wages, hours, or conditions of employment and is therefore not covered by the nonstatutory labor exemption." 2004 U.S. Dist. LEXIS 1396 at *44.

the teams don't feel they have the maturity and growth, they shouldn't select them or encourage them to come."³⁸⁰

Until recently, the absence of legal recourse to contest a collectively bargained ban was overshadowed by the refusal of Hunter to abandon high school players. In fact, it appeared the only ban the NBPA would accept on high school players were the decisions of NBA general managers to draft other players. Yet despite the remarkable vehemence of Director Hunter's comments, the NBPA has recently opened the door ajar for negotiating an age ban. In May 2003, a spokesman for the NBPA intimated that a ban may be a negotiable item in upcoming collective bargaining discussions: "It remains to be seen how much importance [an age ban] has to the owners. They have never shown an indication that they are willing to offer something in return."³⁸¹

Therefore, it remains a possibility that the NBPA could change its mind and agree to ban high school players during the next CBA negotiations, particularly if the NBA offers concessions that would benefit a large percentage of existing NBA players. For instance, in exchange for the ban, the NBA could agree to expand the yearly rate at which the salary cap increases, thereby allowing teams to spend more money on players. Keep in mind, it would not be unprecedented for the NBPA and the NBA to agree to limit the financial opportunities of amateur players who seek to enter the NBA. Indeed, the NBPA and the NBA agreed to rookie salary scales as part of both the 1995 CBA and 1999 CBA.³⁸² To the detriment of top NBA prospects, the present scale significantly limits the amount of money first round picks can earn, both at the beginning of their careers and, by delaying their right to unrestricted free agency until after five seasons, during the middle part of their careers as well.³⁸³

Provided the NBPA's union representatives reverse course and agree to ban high school players from the NBA Draft, an influential group of dissatisfied NBPA members could attempt to convince a majority of the NBPA's members to decertify the union. Following *Powell*, *Jackson*, and *White*, where NFL players were able to successfully challenge rules that had been collectively-bargained by a union that was subsequently decertified, and by dictum in *Williams*, where the court insinuated that NBA players may use decertification as a means to overcome the labor exemption, the NBPA would lose its collective bargaining power if decertified. As a result, the NBPA would be invalidated as

³⁸⁰ Marc J. Spears, *Stern Does an About-Face on Age-Limit Standard*, *Denver Post*, May 27, 2001, § Sports, at 11.

³⁸¹ Stephen F. Holder, *Better With Age?*, *Miami Herald*, May 3, 2003, available at <http://www.miami.com/mld/miamiherald/5781947.htm> (quoting Dan Wasserman).

³⁸² See *supra* Part II(b)-(c).

³⁸³ See *supra* Part II(a)(ii)-(iii).

the NBA players' collective bargaining agent and, more importantly, a ban on high school players would be rejected, and any subsequent ban could then only fall under the purview of antitrust laws.³⁸⁴

Perhaps suggesting this remedy for high school players is not entirely far-fetched, when a large number of NBPA members were dissatisfied with a proposed CBA reached by the NBPA and NBA in 1995, a movement to decertify nearly succeeded.³⁸⁵ Of course, Michael Jordan and Patrick Ewing, arguably two of the NBPA's most influential members, led the decertification movement. In contrast, high school players are not even members of the NBPA, let alone influential ones. Therefore, to animate a requisite number of NBPA members, a feasible movement to decertify the NBPA would likely require the leadership of prominent NBPA members. To add credibility to the movement, it stands to reason that influential NBA players who joined the NBA right out of high school, such as Kobe Bryant or Kevin Garnett, would be particularly persuasive leaders. In any event, to realistically gain the support of a majority of NBPA members, the decertification movement would have to couple its opposition to a ban on high school players with opposition to proposed provisions of greater dissatisfaction to existing members. In other words, it seems extremely unlikely the NBPA would implode solely over an issue of no consequence to current NBPA members, particularly if the NBA makes concessions in other areas. As a result, a viable decertification effort would require a confluence of contentious labor conditions, rather than concern limited to high school players' access to the NBA Draft.

B. Unilateral Imposition of NBA Rule to Ban High School Players

The second method by which high school players could be banned from the NBA Draft would entail the NBA removing their draft eligibility. Most likely, the NBA could require all players to have played at least one year of college or minor league/European basketball before entering the NBA Draft. In response, high school players could allege that the NBA has boycotted them from the NBA, as a "boycott" of high school players from the NBA Draft would illustrate an industry self-regulatory scheme. An industry self-regulatory scheme typically involves a horizontal axis creating rules that preclude either access to its association or in some way disadvantage those parties outside the association.³⁸⁶ Therefore, a ban on high school players would preclude their access into the NBA, since the NBA Draft is the exclusive means by which desired amateur

³⁸⁴ See Part III for antitrust analysis.

³⁸⁵ See *infra*.

³⁸⁶ See *infra*.

players may enter the NBA.

For the most part, group boycotts pertaining to industry self-regulatory schemes are considered *per se* illegal.³⁸⁷ Most importantly from the standpoint of the high school players, *per se* analysis would relieve them of the burden of proving anticompetitive effects, which are presumed.³⁸⁸ Moreover, if pure *per se* analysis were applied, the court would not consider the NBA's procompetitive arguments. Practically, therefore, if a court elected to apply *per se* analysis to a boycott of high school players, it would have already decided to find the boycott *per se* illegal.

The probability of a court applying *per se* analysis to a boycott of high school players may increase when one considers the Supreme Court's holding in *Northwest Wholesale Stationers*, where the court limited the use of *per se* treatment to those boycotts where the boycotting party "possesses market power or...has exclusive access to either supply or an essential element so that competition is affected."³⁸⁹ Therefore, for high school players to obtain *per se* analysis of a rule banning them from the NBA Draft, they would have to demonstrate: a) the NBA possesses market power; or b) the NBA has exclusive access to either supply (players) or an essential element so that competition is affected.³⁹⁰

The NBA clearly has market power in the American industry of professional basketball. Simply put, there is no comparable employment substitute for basketball players. As noted earlier, the average NBA player salary is \$4,917,100, the minimum salary is \$367,000, and the maximum possible salary under the 1999 CBA is \$14,875,000 (Kevin Garnett earns \$22,400,000 because he signed his contract under the previous CBA, and thus qualifies for an exception in the 1999 CBA).³⁹¹ In contrast, other professional basketball leagues in the United States pay their players appreciably less. For instance, the International Basketball Association, which features eight teams located in mostly East Coast cities, pays an average salary of \$50,000, with the maximum

³⁸⁷ See e.g., *Radiant Burners, Inc. v. People's Gas, Light & Coke Co.*, 364 U.S. 656, 680 (1961); *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n.*, 312 U.S. 457 (1941).

³⁸⁸ *Rebel Oil Co., Inc. v. Atlantic Richfield*, 51 F.3d 1421, 1443 (9th Cir.), cert. denied, 116 S. Ct. 515 (1995).

³⁸⁹ See Sullivan & Harrison, *supra* note 318, at 164.

³⁹⁰ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956) (broadly defining "market power" as "the power to control prices or exclude competition"). See also *United States v. Alcoa*, 148 F.2d 416, 424 (2d. Cir. 1945) (Judge Learned Hand remarking that market power is certain when the market is 90% controlled by either one entity or a group of entities).

³⁹¹ Aditi Kinkhabwala, *Question of Fairness*, San Antonio Express-News, Mar. 31, 2002, at 6M.

salary set at \$100,000.³⁹² Slightly more impressive, the American Basketball Association, which features 12 teams, pays an average salary of \$200,000.³⁹³

Even if the market power of the NBA is judged against professional basketball opportunities in foreign countries, the same trend exists: nowhere can a player earn anywhere near as much as he can in the NBA. For instance, salaries in European leagues typically range from \$50,000-\$400,000, with occasional exceptions for spectacular players, though even these players rarely earn more than \$1,000,000.³⁹⁴ Such a finding may prove important, considering that the U.S. Court of Appeals for the First Circuit recently gave victory to Major League Soccer over its players, primarily because comparable professional soccer leagues in Europe and Latin America prevented MLS from gaining "monopoly" status.³⁹⁵ In the world of professional basketball, however, there are no comparable leagues to the NBA.

Salary disparities alone do not distinguish the NBA from other professional basketball leagues. Indeed, endorsement income, often a byproduct of television and other media exposure, dwarfs that available in other professional basketball leagues. Such a disparity is most evident when observing the endorsement salaries of the NBA's best players. For instance, Shaquille O'Neal earns over \$24,000,000 a year in endorsements,³⁹⁶ while teammate Kobe Bryant earns over \$15,000,000 and, despite a largely checkered past including jail time, rival Allen Iverson takes in \$5,000,000.³⁹⁷ Likewise, LeBron James—months before taking his first jumper as a Cavalier—secured endorsement contracts that will pay him approximately \$15,000,000 this season alone.³⁹⁸ Perhaps even more remarkable, lesser players, such as Eduardo Najera of the Dallas Mavericks, can earn over \$1,000,000 a year in endorsements, as is the case with Najera, whose 2002 endorsement income of \$1,000,000 trumped his comparatively meager 2002 basketball salary of \$420,000.³⁹⁹

Essentially, therefore, the NBA has a global monopoly on premier professional basketball. Simply put, the NBA possesses *the* exclusive market of

³⁹² John Jiloty, Ralph Sampson finds his Rhythm in fledgling IBL, Wash. Times, July 20, 1999, at B2.

³⁹³ Anwar S. Richardson, ABA 2000 will have a fight for survival, Tampa Trib., Jan. 9, 2000, at 8.

³⁹⁴ Barbara Barker, This Bus Takes the Road Much Less Traveled, Newsday, Jan. 2, 2002, at A64; see also Mark Gomez, Airmail Jordan, L.A. Times, July 24, 1999, at D10.

³⁹⁵ *Fraser v. Major League Soccer*, L.L.C., 284 F.3d 47, 53–54, 71 (1st Cir. 2002). For background on this case, see *MLS No Monopoly*, Appeals Court Rules, Milwaukee J. Sentinel, Mar. 21, 2002, at 02C.

³⁹⁶ Mark Heisler, It Appears Only The Lakers Can Beat The Lakers, L.A. Times, Oct. 30, 2001, at 13.

³⁹⁷ Stephen Fatsis, Can Iverson Pitch to Mainstream?, Wall St. J. June 8, 2001, at B1.

³⁹⁸ Darren Rovell, Win or Lose, Cavaliers are Part of the Package, ESPN.com, Sept. 10, 2003, available <http://espn.go.com/sportsbusiness/columns/misc/1612716.html>.

³⁹⁹ Richard Alm, Marketing Promise for Najera is bueno, Dallas Morning News, Apr. 4, 2002 at 2D.

the very best basketball one can see, and no other league can approach this level of quality. As a result, a court may invoke *Northwest Wholesale Stationers'* narrow exception for the application of *per se* analysis to those group boycotts orchestrated by an entity or group of entities possessing market power. Alternatively, the exception may be invoked because the NBA, with its incomparable salary structure, effectively has exclusive access to the supply of premier basketball talent.⁴⁰⁰

For the two reasons discussed in Part III, however, a court is unlikely to apply pure *per se* analysis to a boycott of high school players. First, courts have increasingly blurred the line between *per se* and rule of reason.⁴⁰¹ Second, courts have repeatedly deferred to the self-regulation of professional sports leagues.⁴⁰²

An interesting example of how the NBA Draft has been affected by the interplay of these two trends comes from *Denver Rockets v. All-Pro Management*,⁴⁰³ where a court applied quasi rule of reason analysis to conclude that a NBA self-regulation on draft eligibility constituted a *per se* group boycott. In this case, Spencer Haywood, a 19-year old basketball player from an impoverished family, successfully characterized as an unreasonable restraint of trade a unilaterally imposed NBA rule preventing players from playing in the NBA until their high school class graduated from college.⁴⁰⁴

⁴⁰⁰ In addition, the Supreme Court has also held that proof of actual detrimental effect "can obviate the need for an inquiry into market power." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); see also Lawrence A. Sullivan, *The Viability of Current Law on Horizontal Restraints*, 75 *Calif. L. Rev.* 835, 849 (1987) (concluding that "blatantly anticompetitive" group boycotts obviate the need for a showing of market power under Section 1 of the Sherman Act). As a result, if a court is simply disgusted by a ban on teenage players, it may very well ignore an analysis into market power or its access.

⁴⁰¹ See Sullivan & Harrison, *supra* note 318, at 35 (finding "per se and Rule of Reason do not represent a true dichotomy. Instead, what has evolved is an approach that seems to require greater precision in the determination of actual impact").

⁴⁰² See *infra*.

⁴⁰³ 325 F. Supp. 1049 (C.D. Cal. 1971).

⁴⁰⁴ See Section 2.05 of the NBA by-laws, which provided as follows:

"High School Graduate, etc. A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights whatsoever; nor shall a Member violating the provisions of this paragraph be permitted to acquire the rights to the services of such person at any time thereafter." *Id.* at 1059.

Haywood's intriguing mix of professional abilities and personal circumstances made him an attractive test case. Indeed, Haywood had led the USA Olympic Basketball Team to a gold medal in the 1968 Olympic games and was regarded by many as a future superstar in professional basketball.⁴⁰⁵ In addition, Haywood had played two successful seasons of college basketball.⁴⁰⁶

Not only was Haywood a unique talent on the court, but, from the standpoint of his lawyers, his personal circumstances made him even more desirable. Specifically, Haywood was one of 10 children from an impoverished family.⁴⁰⁷ When the riches of professional basketball were there for the taking, Haywood seemed particularly well-justified in grabbing them.

On the other hand, Haywood was not an amateur when he brought suit. In 1969, Haywood dropped out of college and signed a six-year contract worth \$1.4 million with the Denver Rockets of the ABA, the NBA's rival league.⁴⁰⁸ Remarkably, Haywood won the ABA's Most Valuable Player, Scoring Champion, and Rookie of the Year awards during his dominating first season of professional basketball.⁴⁰⁹ At the very least, Haywood's rookie season muted those who argued that a professional basketball player could not succeed unless he had four years of college experience behind him.

Not surprisingly, Haywood's rookie performance attracted the attention of teams in the NBA. When the Seattle Supersonics offered Haywood \$250,000 a year over 15 years, Haywood decided to abrogate his contract with the Rockets, and signed with Supersonics.⁴¹⁰ Immediately, other NBA teams cried foul, alleging that the Supersonics and Haywood had circumvented the NBA Draft, even though Haywood had already played a season of professional basketball.⁴¹¹

Under pressure from NBA team executives, the NBA decided to nullify Haywood's contract because the Supersonics had signed Haywood prior to the

⁴⁰⁵ Hal Bock, *Haywood Sees Age Problem*, *Rec.*, Feb. 18, 2001, at S12; see also Bill Wallace, *Haywood Feels Some Responsibility*, *Telegraph Herald* (Dubuque, IA) July 4, 2001, at B3; see also Finger, *supra* note 178.

⁴⁰⁶ Haywood played one season at Trinidad State Junior College and a second season at the University of Detroit. *Id.*

⁴⁰⁷ *Id.* Haywood's impact on his family's economic position was amplified by the fact that he earned much more than anyone else in his family, most of whom earned minimum wage salaries. Roscoe Nance, *Haywood's case opened doors for early entry*, *USA Today*, Feb. 12, 2001, at 5c.

⁴⁰⁸ Like the NBA, the ABA did not allow underclassmen to play in their league, though Haywood sued and won the right to join the Denver Rockets. Finger, *supra* note 178.

⁴⁰⁹ Bock, *supra* note 405.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* Note also that the ABA also sued Haywood "for unspecified millions" because he had breached his contract. *Id.*

four-year anniversary of his high school class graduation.⁴¹² Haywood then brought suit against the NBA, arguing that its self-regulation constituted a boycott of him and similarly situated players, thereby constituting a *per se* violation of the Sherman Act.⁴¹³

The decision of the court was clear: it granted a preliminary injunction against the NBA, and found its age requirement to constitute a *per se* illegal boycott.⁴¹⁴ Central to the court's decision was the inflexible nature of the rule, for it failed to provide an exception for unique talent or financial circumstance. That is, the NBA, by neglecting to consider these factors, failed to implement the requisite procedural safeguards to prevent arbitrariness.⁴¹⁵ Moreover, the court found that the "absolute nature of the rule prohibited the signing of not only college players but also those who did or could not attend college."⁴¹⁶ Implicitly, therefore, the court included high school graduates who did not attend college as part of the boycotted group. As a final point worth exploring, because the court emphasized the absence of procedural safeguards, it stands to reason that had those safeguards been in place, the court may have come to a different conclusion, thus suggesting that a modified ban may have been allowed.⁴¹⁷

As a result of the court's decision, Haywood's contract with the Supersonics was reinstated, and he went on to a successful 14-year career in the NBA. Although his impact on the basketball court was most visible, his ability to overcome a unilaterally imposed rule may have had a greater impact off the court. Illustrating this point, once Haywood's contract with the Supersonics was reinstated in 1971, the NBA created the "hardship rule," which allowed players who suffered from "severe economic hardship" to be drafted prior to the four year anniversary of their high school class graduation.⁴¹⁸ In order to attain eligibility, players had to petition the NBA Commissioner with proof of their economic hardship. In practice, however, the hardship rule was applied so liberally that any player who claimed hardship became eligible.⁴¹⁹

Because the hardship rule was essentially meaningless, the NBA replaced it

⁴¹² Robert A. McCormick and Matthew C. McKinnon, Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws, 33 Emory L.J. 375, 432.

⁴¹³ Eric D. Scheible, No Runs. No Hits. One Error: Eliminating Major League Baseball's Antitrust Exemption Will Not Save the Game, 73 U. Det. Mercy L. Rev. 73, 87.

⁴¹⁴ *Denver Rockets*, 325 F. Supp. at 1066.

⁴¹⁵ *Id.* at 1064-65.

⁴¹⁶ *Id.* at 1066.

⁴¹⁷ Cozzillio and Levinstein *supra* note 282, at 265.

⁴¹⁸ McCormick and McKinnon, *supra* note 412, at 434; see also Finger, *supra* note 178.

⁴¹⁹ *Id.* at 434. Also, while in 1971 these players were part of a separate draft—the "Hardship Draft"—they were included with the other possible draft picks beginning with the 1972 Draft. Graves, *supra* note 43, at 187-88.

in 1976 with the declaration procedure that remains employed to this day. As discussed in Part I, any amateur player may declare his intention to be eligible for the NBA Draft, provided both his high school class has graduated and he has made his declaration within 45 days of the NBA Draft.⁴²⁰

Interestingly, from the standpoint of high school players, *Denver Rockets* is bolstered by dictum in *Wood*. Though we earlier observed the court deny Leon Wood the right to evade an NBA Draft rule that had been collectively bargained by the NBA and the NBPA, the court articulated a far different standard for those rules unilaterally imposed by the NBA: "We may further assume that were these arrangements agreed upon by the NBA teams in the absence of a collective bargaining relationship with a union representing the players, they would be illegal and plaintiff would be entitled to relief."⁴²¹ Likewise, the *Wood* court placed great significance on the fact that the NBA Draft was not "the product solely of an agreement among horizontal competitors but [is] embodied in a collective agreement between the employer or employers and a labor organization reached through procedures mandated by federal labor legislation."⁴²²

A similar case in professional football bears attention as well. In *Boris v. United States Football League*,⁴²³ the court held that a professional sports league could not unilaterally impose a rule excluding a college player from the league's draft simply because the player had not yet graduated from college. By doing so, the court concluded, the USFL and its teams were engaging in a group boycott, thereby committing a *per se* violation of Section 1 of the Sherman Act.⁴²⁴ Like the NBA, the USFL was an unincorporated association comprised of privately owned member teams, each bound by membership rules, including draft requirements. Unlike the NBA, however, the USFL did not have a players association to collectively bargain any of its rules.

Perhaps most significant, the *Boris* court questioned many of the reasons the USFL offered for its draft eligibility rule, particularly in relation to the one reason the USFL failed to mention: "the principal reason for the adoption by the USFL and its member teams of the Eligibility Rule was to respond to apparent demands made by college football programs and thereby to gain better access to these programs towards the end of selecting the best college players available."⁴²⁵ In other words, by guaranteeing that the USFL would not raid

⁴²⁰ See *supra*.

⁴²¹ 809 F.2d 954, 959 (2d Cir. 1987).

⁴²² *Id.*

⁴²³ 1984 Trade Cas. (CCH) ¶ 66,012, (C.D. Cal. 1984).

⁴²⁴ *Id.*

⁴²⁵ *Id.*

college programs of their players before their collegiate eligibility expired, college programs would steer some of their players towards the USFL, rather than the NFL—the competing and in most respects, superior professional football league.⁴²⁶ Equally notable, the court regarded the “principal reason” behind the draft rule as far more important than those proffered by the USFL—reasons which happen to echo some of the same reasons presently offered by the NBA: “very few college-athletes are physically, mentally, or emotionally mature enough for professional football . . . the Eligibility Rule promotes the concept of the importance of a college education . . . the Eligibility Rule promotes the efficient operation of the USFL by strengthening the sport at the college level so that the USFL does not have to develop players at that level.”⁴²⁷

These cases suggest that the apparent arbitrariness of a NBA rule banning high school players would open the door for an antitrust challenge under rule of reason. Indeed, the most troubling concern articulated by both *Silver* and *Denver Rockets*—that an absence of due process unfairly precludes access—is readily evidenced in a blanket ban on high school players. Coupled with the NBA’s unparalleled market power, which adheres to concerns set forth by *Northwest Wholesale Stationers*, and with the absence of collective bargaining, which adheres to concerns set forth by *Wood*, and, finally, with the dubious rationales offered by the NBA, many of which mimic those unsuccessfully championed by the USFL in *Boris*, the absence of due process may enable the high school players to prevail.

On the other hand, courts have repeatedly upheld unilaterally imposed league rules. Most recently, in *Fraser v. Major League Soccer*,⁴²⁸ the court applied rule of reason to a restraint on player movement, leading to a characterization of sports teams as part of a “joint venture.”⁴²⁹ Because joint ventures require a certain degree of collaboration between its entities, the court concluded that “some form of cooperation among the teams” was appropriate.⁴³⁰

Applying this principle to our fact pattern, the NBA may argue that cooperation among NBA teams is necessary to ban high school players, since individual NBA teams often feel pressured into selecting high school players out of fear they may miss out on the next superstar. Collectively, however, the NBA may benefit by having high school players play in college for at least one year,

⁴²⁶ For example, while the NFL has prospered, the USFL went bankrupt after three seasons, losing \$163 million along the way. Gordon Forbes, *Check Left a Mark on USFL*, USA Today, Mar. 16, 2000, at 18C.

⁴²⁷ *Id.*

⁴²⁸ 7 F. Supp. 2d 73, 77 (D. Mass. 1998).

⁴²⁹ *Id.* at 77.

⁴³⁰ *Id.*

since those players would receive more playing time as superstar college freshman players than as sparsely-used NBA rookies.⁴³¹ As a result, by the time these players conclude their freshman year, they would be better players than they would if they had spent that year in the NBA. With a ban on high school players, therefore, the NBA would offer a better basketball product, even though certain individual NBA teams may be disadvantaged by losing out on opportunities to select those players.

Although the NBA may indeed be better off by featuring more experienced players, it is doubtful whether it can be considered a joint venture, particularly when compared to MLS. In fact, as professional sports leagues, the NBA and MLS appear readily distinguishable. As indicated in Table 19, MLS is a limited liability company that owns all of its 12 teams, while the NBA is an unincorporated association comprised of 29 privately-owned teams. Aside from variances in corporate form, these leagues operate quite differently. Whereas MLS recruits its players, negotiates their salaries (which are paid by league funds), and controls player movement, each NBA team, within certain parameters, individually negotiates player contracts, pays player salaries, and controls player movement.⁴³¹ Practically, therefore, MLS teams are more closely bound together than are NBA teams, and one would thus expect them to more resemble a joint venture than would NBA teams. Therefore, unilaterally imposed rules in the NBA may be more vulnerable.

⁴³¹ *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 53–54 (1st Cir. 2002).

TABLE 19: COMPARING CORPORATE ENTITIES:
THE NBA AND MAJOR LEAGUE SOCCER

<u>ENTITY</u>	<u>TEAM OWNERSHIP</u>	<u>PLAYER CONTRACTS</u>	<u>PLAYER SALARIES</u>	<u>PLAYER MOVEMENT</u>
NBA	Teams owned by Private Owners	Negotiated by Individual Teams	Paid by Individual Teams	Controlled by Individual Teams
MLS	Teams owned by League	Negotiated by League	Paid by League	Controlled by League

Even if a court regards unilateral rules as inappropriate for the NBA, rule of reason analysis would still require the high school players to demonstrate that banning them affects competition in the NBA. Otherwise, their "harm" may not rise to a violation of antitrust law. The high school players may have difficulty in this pursuit. First, each NBA team has an active roster of 12 players, and with three additional roster spots for injured players, a complete roster of 15 players. There are 29 teams in the NBA, thereby at any one time, there are a total of 435 players on NBA rosters. Presently, there are 18 players in the NBA who ascended directly from high school to the NBA, thus comprising only 4.1% of all players. Therefore, NBA rosters are clearly not dependent on high school players. Then again, in *Denver Rockets*, the court could specifically identify only one player boycotted, yet, unlike the seasoned Haywood, almost every contemporary high school player struggles during his rookie season. Seemingly, therefore, if high school players are required to wait one season before entering the NBA Draft, their absence would not have much impact on most games since those players do not play much anyway. As a result, high school players are especially vulnerable to an argument that a ban on them would have little effect,

particularly when they could enter the NBA after one year of college basketball.

Though any fact-based judicial analysis is largely unpredictable, a unilaterally imposed ban on high school graduates would likely constitute a group boycott under rule of reason analysis. This ban would clearly violate the spirit of *Silver*, *Northwest Wholesale Stationers*, *Denver Rockets*, *Wood*, and *Boris*. In addition, a court may find that the NBA could have achieved the same result—ensuring that only mature high school players enter the NBA—by less restrictive means, such as a mandatory interview process or, as it attempted from 1971 to 1976, consideration of financial need. Notably, this very conclusion was reached by Judge Scheindlin in *Clarett*.⁴³² Perhaps even more persuasive, a high school player may argue that the punitive aspect of failing to get drafted *already* served as a weeding-out process, since, until the April 2002 modifications, ill-prepared players were likely deterred by the prospect of losing their collegiate eligibility. Considering the exceptional draft record of high school entrants, it appears that such a phenomenon routinely occurred, and considering that the April 2002 modifications may financially disadvantage those high school entrants who are not selected at the beginning of the NBA Draft, this trend should only continue. Finally, as a professional sports league, the NBA appears poorly suited to portray itself either as a joint venture between owners or as merely one of many professional basketball leagues. To the detriment of the high school players, however, is the fact there are so few of them, as well as their tendency to struggle during their first season, therefore casting doubt as to whether their one-year absence would have any appreciable impact on the competitiveness of the NBA.

CONCLUSION

The NBA will likely lose its campaign against high school basketball players who seek to bypass college and pursue employment in the world's premier basketball league. Whether a court applies *per se* or rule of reason analysis, the same conclusion will likely arise: The NBA would engage in an illegal group boycott if it imposes such a ban. Should the NBA and NBPA agree to a ban, however, it may withstand judicial challenge, as courts have already honored restrictions on the NBA Draft that result from collective bargaining. Although the upcoming appeal of *Clarett* before the U.S. Court of Appeals for the Second Circuit would impact the viability of a collectively-bargained ban between the NBA and NBPA, such a ban seems unlikely from a practical standpoint, since

⁴³² 2004 U.S. Dist. LEXIS 1396, at *91 (suggesting that the NFL could use an assortment of physical and mental examinations "to screen out players who are not prepared to play in the NFL").

the NBPA has repeatedly pledged to preserve opportunities for high school players. Nevertheless, in the unlikely event that both *Clarett* is reversed and the NBPA reverses course and agrees to a ban, an influential group of dissenting NBPA members could convince a majority of their colleagues to vote to decertify. If the NBPA were decertified, it would lose its collective bargaining power, thus placing any subsequent ban on high school players under the purview of antitrust laws. If based solely on opposition to a ban, however, an effort to decertify would likely fail, particularly if in exchange for the ban, the NBA offers enhanced financial opportunities to existing players.

Given the extraordinary success of high school players who have declared for the NBA Draft, we might pause to consider why the NBA would even pursue such a ban. Indeed, high school players who have declared have encountered more success than has any other age cohort. Their success is evident not only by their penchant for obtaining selection in the first round, but also by their ability to secure free agency earlier in their playing careers, thus enhancing their long-term financial opportunities. Moreover, while high school draft picks typically struggle during their rookie season, they tend to excel two or three years later, and considering that the current CBA precludes unrestricted free agency until after a first round pick's fifth season, such early struggles prove largely insignificant. Similarly important, high school players have excelled off the court, thus countering concerns that they are immature for NBA life. Finally, NBA prospects rarely complete college, and even while in college, they often devote their lives to the court, rather than the classroom, all of which casts doubt on the purported "value" of a college education.

More likely than not, the NBA has pursued a ban for two reasons that have little to do with the welfare of high school players. First, the NBA is under pressure by the NCAA, its participating schools, coaches, and private media companies—*i.e.*, the groups which profit considerably from college basketball—to dissuade high school players from entering the NBA Draft so that they play college basketball for at least one season. By doing so, the college game will improve, as will its television ratings, thereby increasing revenues for everyone involved with college basketball—except, of course, its players, who are prohibited from sharing in its profits. Second, NBA team executives openly worry about the unpredictability of drafting high school players, as well as the costs of scouting high school games, though, in truth, such concerns seem inapposite with the unparalleled success achieved by high school draft picks. If anything, these players appear to be uncommonly safe picks, which is not surprising, since until April 2002, high school players risked losing their

collegiate eligibility if they went undrafted. Although the NCAA's April 2002 modifications may initially appear to encourage more high school players to declare, such a phenomenon has not yet been evidenced. Indeed, if utilized by high school players, the April 2002 modifications would financially disadvantage them, either at the beginning or middle of their NBA careers. As a result, future NBA drafts should reaffirm past practice: Only the best high school prospects typically pursue the NBA, thereby enabling them to entertain basketball fans earlier and more often.